TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1901~~ 1902.

No. ~~192~~ 109.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, PLAINTIFF IN ERROR,

vs.

ALPHONSINE McGREW.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED MAY 25, 1901.

(18,187.)

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No. 336.

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a In the Supreme Court of the State of California.

ALPHONSINE McGREW, Respondent,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW York, Appellant. } S. F. No. 1230.

Transcript on Appeal.

(From superior court, city and county of San Francisco.)

Chickering, Thomas & Gregory, attorneys for appellant.
Platt & Bayne, attorneys for respondent.

Filed this Dec. 13, 1897 *day of* ——, *A. D. 1897.*
T. H. WARD, *Clerk,*
By E. S. BUTTERWORTH,
Deputy Clerk.

1 In the Supreme Court of the State of California.

Transcript on Appeal.

(From superior court, city and county of San Francisco.)

In the Superior Court of the City and County of San Francisco, State of California.

ALPHONSINE McGREW, Plaintiff,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW York, Defendant. } No. 50595.

Amended Complaint.

Plaintiff above named, complaining of the defendant above named, for cause of action alleges—

That the defendant is, and at all the times herein mentioned has been, a corporation duly organized and existing under the
2 laws of the State of New York, having its principal place of business in the city of New York, State of New York.

That on the 14th day of September, in the year 1892, the said defendant, The Mutual Life Insurance Company of New York duly made, executed and delivered to Henri Goulden McGrew a certain policy of insurance wherein and whereby the said defendant promised and agreed to pay unto the said plaintiff, Alphonsine McGrew, the sum of five thousand ($5,000.00) dollars, upon the death of said Henri Goulden McGrew during the continuance of the said policy of insurance, provided said Alphonsine McGrew were living at the time of the death of said Henri Goulden McGrew, and upon acceptance of satisfactory proofs at its home office of the death of said Henri Goulden McGrew during the continuance of said policy, and upon the condition that the annual premium of one hundred and

thirteen $\frac{50}{100}$ ($113.50) dollars should be paid in advance on the delivery of said policy, and thereafter to said company at its home office in the city of New York, State of New York, on the 14th day of September, in every year during the continuance of said policy, and subject to the provisions, requirements and benefits stated on the back of said policy.

That the said Henri Goulden McGrew paid said annual premium of one hundred and thirteen $\frac{50}{100}$ ($113.50) dollars in advance upon the delivery of said policy, and thereafter paid to said com-
3 pany the said annual premium every year during the continuance of said contract and up to the time of his death.

That said Henri Goulden McGrew died upon the 22nd day of October, in the year 1894, at Honolulu, in the Hawaiian islands.

That said payments of said premiums were made in said Honolulu, and were there accepted by said defendant.

That, since the death of said Henri Goulden McGrew, the plaintiff has furnished to said defendant satisfactory proofs of the death of said Henri Goulden McGrew during the continuance of said policy, and said satisfactory proofs have been accepted by said defendant at its home office, in said city of New York.

That said plaintiffs presented said proofs to said defendant on or about the 9th day of February, in the year 1895, and demanded of said defendant the payment of said sum of five thousand ($5,000.00) dollars, under and in accordance with said policy of insurance.

That said defendant refused, and has ever since refused, and still refuses, to pay to said plaintiff, the said sum of five thousand ($5,000.00) dollars, or any part thereof, and has not paid to said plaintiff the said sum of five thousand ($5,000.00) dollars, or any part thereof.

That the following are the provisions, requirements, and benefits set forth on the back of said policy of insurance, to wit:—

4 Payment of premiums.—Each premium is due and payable at the home office of the company, in the city of New York, but will be accepted elsewhere when duly paid in exchange for the company's receipt, signed by the president or secretary. Notice that each and every such payment is due at the date named in the policy is given and accepted by the delivery and acceptance of this policy, and any further notice required by any statute, is thereby expressly waived. That part of the year's premium, if any, which is not due and is unpaid at the maturity of this contract, shall be deducted from the amount of the claim. If this policy shall become void by non-payment of premium, all payments previously made shall be forfeited to the company, except as hereinafter provided.

Dividends.—This policy is issued on the five-year distribution plan. It will be credited with its distributive share of surplus apportioned at the expiration of each five years from the date of issue. Only five-year distribution policies in force at the end of such term, hall share in such distribution of the surplus; and no other disribution to such policies shall be made at any previous time. All urplus so apportioned may be applied at the end of such period in

payment of future premiums on this policy, if requested in writing, or may then be drawn in cash. The surplus may be applied
5 at each distribution to purchase additional insurance, without medical examination; provided, such application of the surplus be elected in due form not less than two years before the end of the first dividend period of five years; otherwise, a satisfactory examination will be required for each such application of the surplus.

Paid-up policy.—After three full annual premiums have been paid upon this policy, the company will, upon the legal surrender thereof, before default in payment of any premium, or within six months thereafter, issue a non-participating policy for paid-up insurance, payable as herein provided, for the amount required by the provisions of the act of May 21, 1879, chap. 347, Laws of the State of New York.

Surrender.—This policy may be surrendered to the company at the end of the said first period of five years, and eighty per cent. of the reserve computed by the American table of mortality and four and one-half per cent. interest, and the surplus as defined above, will be paid therefor in cash.

Incontestability.—It is hereby further promised and agreed that, after two years from the date hereof, the only conditions which shall be binding upon the holder of this policy are, that he shall pay the premium, at the times and place in the manner stipulated in said policy, and that the requirements of the company as to age,
6 and military or naval service in the time of war, shall be observed, and that in all other respects, if this policy matures after the expiration of the said two years, the payment of the sum insured by this policy shall not be disputed.

Notice to the holder of this policy.—No agent has power, on behalf of the company, to make or modify this or any contract of insurance, to extend the time for paying a premium, to bind the company by making any promise, or by receiving any representation or information not contained in the application for this policy.

Assignments.—The company declines to notice any assignments of this policy until the original copy thereof shall be filed in the company's home office. The company will not assume any responsibility for the validity of an assignment.

Wherefore, plaintiff prays for the judgment of this honorable court against said defendant for the sum of five thousand ($5,000.00) dollars and for interest thereon from the 9th day of February, in the year 1895, and for her costs of suit.

PLATT & BAYNE,
Attorneys for Plaintiff.

Duly verified.

(Endorsed:) Filed Aug. 14th, 1895. C. F. Curry, clerk. By J. Voisinet, deputy clerk.

7 (Title of Court and Cause.)

Demurrer to Amended Complaint.

The defendant demurs to the amended complaint herein, and specifies as grounds for demurrer that said complaint does not state facts sufficient to constitute a cause of action.

II.

That said amended complaint is uncertain in this, that it does not appear therein, and cannot be determined therefrom, whether the requirements of said company, as to age, and military or naval service in time of war, have been observed by the said insured.

III.

That the said amended complaint is ambiguous, for the same reason as heretofore alleged, upon the ground of uncertainty.

IV.

That this court has no jurisdiction over the subject-matter of this action.

Wherefore, having fully answered, defendant prays that it go hence with its costs.

CHICKERING, THOMAS & GREGORY,
Attorneys for Defendant.

(Endorsed:) Filed Oct. 3, 1895. C. F. Curry, clerk. By J. Voisinet, deputy clerk.

8 (Title of Court and Cause.)

Minute Order Sustaining Demurrer to Plaintiff's Amended Complaint.

In this action, the demurrer of the defendant to plaintiff's complaint having been heretofore submitted to the court for consideration and decision, and now the court, having considered the same, and being fully advised in the premises, it is ordered that said demurrer be, and the same is, hereby sustained, with leave to said plaintiff to amend her complaint in five days.

October 14, 1895.

A. A. SANDERSON, *Judge.*

(Title of Court and Cause.)

Amendment to Amended Complaint.

I.

Amend line 19, page 2, by inserting the words "and San Francisco," after the word "Honolulu," so that said line will read, "said Honolulu and San Francisco, and were there accepted by said defendant":

II.

Insert between lines 19 and 20 on page 2 of said complaint, the following: "That the requirements of said defendant as to age, and

military or naval service in the time of war, were all observed by said Henri Goulden McGrew during the continuance of said
9 policy, and said Henri Goulden McGrew duly performed all the conditions on his part to be performed under said policy, and during the continuance thereof."

PLATT & BAYNE,
Att'ys for Plaintiff.

Duly verified.

(Endorsed:) Filed Oct. 15, 1895. C. F. Curry, clerk. By J. Voisinet, deputy clerk.

(Title of Court and Cause.)

Demurrer to Second Amended Complaint.

Defendant demurs to complaint herein, and specifies as grounds for demurrer:—

I.

That this court has no jurisdiction over the subject-matter of said action.

II.

That the said complaint states no cause of action against this defendant.

Wherefore, having fully answered, said defendant prays that it be hence dismissed, with its costs.

CHICKERING, THOMAS & GREGORY,
Attorneys for Defendant.

(Endorsed:) Filed Oct. 25th, 1895. C. F. Curry, clerk. By J. Voisinet, deputy clerk.

10 (Title of Court and Cause.)

Minute Order Overruling Demurrer and Denying Motion to Strike Out Parts of the Plaintiff's Second Amended Complaint.

In this action, the defendant's motion to strike out parts of plaintiff's second amended complaint, and the demurrer to the second amended complaint coming on regularly for hearing, Messrs. Platt & Bayne appearing as counsel for the plaintiff, and no appearance being made on defendant's behalf—

It is ordered, that said motion be denied for want of prosecution, and that said demurrer be, and the same is, hereby overruled for want of prosecution.

Ten (10) days to answer.

Entered November 1st, 1895.

A. A. SANDERSON, *Judge.*

(Title of Court and Cause.)

Amended Answer.

Comes now the above-named defendant, and by leave of court first had and obtained, files this its amended answer to the amended complain- herein, and in that regard admits, denies and alleges, as follows, to wit:—

This defendant denies that, on the 14th day of September, 1892, or at any other time, it duly, or at all, made, executed, and
11 delivered, or made, or executed, or delivered, to Henri Golden McGrew, a certain, or any, policy of insurance, wherein and whereby said defendant promised and agreed to pay unto the said plaintiff, Alphonsine C. McGrew, the sum of $5,000.00 upon the death of said Henri Golden McGrew, save as hereinafter stated.

And further answering, this defendant alleges:

I.

That heretofore, to wit: on or about the 14th day of September, 1892, this defendant did duly make, execute, and deliver to Henri Golden McGrew a certain policy of insurance, being the same policy mentioned in the complaint herein, wherein and whereby the said defendant did promise and agree to pay unto Alphonsine C. McGrew, as the wife of said Henri Golden McGrew, the sum of five thousand ($5,000) dollars, upon the death of the said Henri Golden McGrew, during the continuance of said policy of insurance, provided said Alphonsine C. McGrew were living at the time of the death of said Henri Golden McGrew, and upon acceptance of satisfactory proof of the death of said Henri Golden McGrew, during the continuance of said policy.

II.

That the said Henri Golden McGrew, was, upon said 14th day of September, 1892, and continuously thereto up to the time of his
12 death, as hereinafter set forth, a resident of the Hawaiian islands.

III.

That upon the said 14th day of September, 1892, and continuously thereto down to the 24th day of August, 1894, the said Henri Golden McGrew and said plaintiff, Alphonsine C. McGrew, were husband and wife.

IV.

That subsequent to the said 14th day of September, 1892, and prior to the 8th day of February, 1894, the said Henri Golden McGrew did become of unsound mind, and thereafter, upon due proceedings had, Charles L. Carter, residing at said city of Honolulu, was duly appointed the guardian of the person and estate of said Henri Golden McGrew, an incompetent person, as aforesaid.

V.

That upon the 8th day of February, 1894, the said Charles L. Carter, guardian as aforesaid, and on behalf of Henri Golden McGrew, did file in the circuit court of the first judicial circuit of the Republic of Hawaii, which said court had jurisdiction over said parties and said cause, a libel praying for a divorce from the said Alphonsine C. McGrew upon the ground of adultery of the said Alphonsine C. McGrew; and thereafter the said Alphonsine C. McGrew, being then and there a resident of said Hawaiian islands, did appear in said action and contest the same.

13 VI.

That thereafter, to wit: upon the 18th and 20th days of August, 1894, the said cause was heard in the said circuit court, and both parties appeared therein; and subsequent, to wit: on the 23rd day of August, 1894, a decision was rendered by the said circuit court dissolving the bonds of matrimony theretofore existing between said parties, upon the ground of the adultery of the said Alphonsine C. McGrew, which said decree of divorce has never been modified or set aside, and ever since has been, and now is, in full force and effect.

VII.

That under and by virtue of the Hawaiian law in force at the time said decree of divorce was granted and now in force, it is provided:

"When a divorce is decreed for the adultery or other offense amounting thereto, of the wife, the husband shall hold her personal estate forever, and he shall hold her real estate so long as they shall live; and if he shall survive her, and there shall be issue of the marriage born alive, he shall hold her real estate for the term of his own life, as a tenant by the courtesy; provided that the court may make such reasonable provision for the divorced wife out of any real estate that may have belonged to her, as it may deem proper."

14 That under and by virtue of the foregoing provision of law, and decree of divorce, all rights of the said Alphonsine C. McGrew in and to said policy of insurance did pass to the said Henri Golden McGrew and become his absolute property free and clear of any claims of the said Alphonsine C. McGrew, plaintiff herein, whatsoever.

VIII.

That thereafter, to wit: on or about the 22nd day of October, 1894, the said Henri Golden McGrew died at Honolulu, in the Hawaiian islands.

IX.

That subsequent to the death of said Henri Golden McGrew, as aforesaid, one J. O. Carter was, by an order duly given or made, appointed the administrator of his estate by a court of competent jurisdiction of the said Hawaiian islands, and thereafter the said

J. O. Carter, as administrator aforesaid, did commence an action in the circuit court of the first circuit of the Hawaiian islands against The Mutual Life Insurance Company of New York, defendant herein, to recover the amount of said policy of insurance, to wit: the sum of five thousand ($5,000) dollars, which said circuit court of the first circuit was a court of competent jurisdiction.

Thereafter, the said Mutual Life Insurance Company of New York, defendant herein, did appear in said action and contest
15 the same; and, notwithstanding, judgment was thereafter given, to wit: on or about the 15th day of October, 1895, in favor of the said J. O. Carter, administrator of the estate of said Henri Golden McGrew, deceased, and against said Mutual Life Insurance Company of New York, defendant herein, for the said sum of five thousand (5,000) dollars, interest and costs, which said judgment was thereafter sustained by the supreme court of the Republic of Hawaii, and the motion for rehearing of said cause made by this defendant denied by the said supreme court, and the said judgment has never been set aside, and is now final.

That subsequent to the denial of said motion for rehearing, said defendant did pay to the said J. O. Carter, administrator, as aforesaid, the full amount due thereon, to wit: the sum of five thousand five hundred and ninety-nine dollars and fifty-nine cents ($5,599.59), and did receive from the said administrator the said policy of insurance duly canceled.

Wherefore, having fully answered, defendant prays that it be hence dismissed, with its costs.

CHICKERING, THOMAS & GREGORY,
Attorneys for Defendant.

Duly verified.

(Endorsed:) Filed May 19th, 1897. C. F. Curry, clerk. By Morgan Backus, deputy clerk.

16 (Title of Court and Cause.)

Decision.

This cause came on regularly for trial on the 13th day of May, in the year 1897, in department number 3 of this court, Hon. George H. Bahrs, presiding; a jury trial having been duly waived in open court. H. G. Platt, Esq., appearing for the plaintiff, and Warren Gregory, Esq., appearing for the defendant; and oral and documentary evidence having been offered, and the court having fully considered the law and the evidence, and being fully advised in the premises, finds as follows:—

Findings of Fact.

1. On the 14th day of September 1892, this defendant made, executed, and delivered to Henri G. McGrew, a certain policy of insurance, being the same policy mentioned in the complaint herein, wherein and whereby the said defendant promised and agreed to

pay unto the plaintiff, Alphonsine McGrew, the sum of five thousand dollars ($5,000.00), upon the death of the said Henri G. McGrew, during the continuance of said policy of insurance, provided said Alphonsine McGrew were living at the time of the death of said Henri G. McGrew, and upon acceptance of satisfactory proof of the death of said Henri G. McGrew, during the continuance of said policy.

2. Henri G. McGrew died on the 22nd day of October, 1894, in Honolulu, Hawaiian islands, and said plaintiff survived him.

17 3. Said Henri G. McGrew upon said 14th day of September, 1892, and continuously and up to the time of his death, was a resident of, and domiciled in, the Hawaiian islands.

4. On the 9th day of February, 1895, plaintiff presented to said defendant satisfactory proof of the death of said Henri G. McGrew, and demanded of said defendant the payment of the sum of five thousand ($5,000.00) dollars, under and in accordance with the terms of said policy of insurance, but defendant has never paid the same, or any part thereof.

5. Subsequent to the said 14th day of September, 1892, and prior to the 8th day of February, 1894, the said Henri G. McGrew became of unsound mind, and thereafter, upon due proceedings had, Charles L. Carter, residing in the city of Honolulu, was duly appointed the guardian of the person and estate of said Henri G. McGrew, an incompetent person, and continued to hold such office of guardian at the time of the filing of the libel of divorce, and the proceedings thereunder hereinafter mentioned.

6. On the 8th day of February, in the year 1894, Charles L. Carter, as guardian and on behalf of Henri G. McGrew, an incompetent person, filed in the circuit court of the first judicial circuit of the Republic of Hawaii, which said court has jurisdiction over

18 said parties and over libels for divorce, a libel praying for a divorce from said plaintiff on the ground of her adultery; and thereafter, and on the 11th day of April, 1894, this plaintiff being then a resident of, and domiciled in, said Hawaiian islands, appeared in said action and contested the same.

7. On the 23rd day of August, 1894, a decision was rendered, and on the 24th day of August, 1894, a decree was signed in said cause by the said circuit court, dissolving the bonds of matrimony theretofore existing between said Henri G. McGrew and this plaintiff, upon the ground of the adultery of this plaintiff.

8. On the 5th day of April, 1894, this plaintiff left the Hawaiian islands with the intention of not returning to said islands, but of coming to the State of California and of making her home in, and permanently residing in, said State. And thereafter, and in due course of her voyage from the Hawaiian islands, and in said month of April, this plaintiff arrived in the State of California, and with said intention above mentioned, thereupon took up her residence in, and made her home in, said State, and with said intention has ever since continuously remained in, and resided in, and made her home in, said State of California; and on the 23rd and 24th days of August, 1894, was actually in, and residing in, said State, with the in-

tention above mentioned of permanently residing and making her home in said State of California.

19 9. Prior to said 5th day of April, 1894, this plaintiff had been excluded by said Charles L. Carter, as such guardian, from the home of said Henri G. McGrew, and was by him thereafter prevented from returning, and has ever since and until the death of said Henri G. McGrew been by him prevented from returning to the same, and was, on said 5th day of April, excluded from said home by said guardian.

10. On said 5th day of April, 1894, this plaintiff had no home, and has never since had a home in the Hawaiian islands.

11. On the 27th day of August, in the year 1894, this plaintiff, through her attorney, filed an exception to said decree of divorce, and gave notice of the filing of said exception, both in accordance with the rules of said circuit court.

12. On the first day of October, 1894, this plaintiff, through her attorney, filed with the clerk of said circuit court a bill of exceptions to said judgment of divorce, within the time allowed by law, and in accordance with a rule of said circuit court, as hereinafter set forth.

13. At the time of the filing of said bill of exceptions, the judge who tried said action of divorce was absent from the Hawaiian islands, and remained absent from said islands until after the death of said Henri G. McGrew.

20 14. Said bill of exceptions has not yet been allowed or certified by the judge of said circuit court, and said exceptions have never been disposed of by said supreme court.

15. The following Hawaiian law was in force in the Hawaiian islands at the time said decree of divorce was granted, to wit: "When a divorce is decreed for the adultery or other offense amounting thereto of the wife, the husband shall hold her personal estate forever."

16. The following statute was in full force and effect in the Hawaiian islands at all the times herein mentioned: "Any party aggrieved by any order or decision of the circuit court, may except thereto, and his exceptions shall be duly noted, and certified to the supreme court, and no order or decree for a divorce shall be made absolute, until such exceptions shall have been disposed of. Said exceptions shall be argued and determined in the supreme court, sitting *in banco*, and if the court *in banco* shall be of opinion that the order or decision excepted to in said circuit court was erroneous, they shall so certify, and thereupon the case shall be heard anew.

17. The following rule of the circuit court of the Hawaiian islands was duly made and given and was in full force and effect in

21 the Hawaiian islands at all the dates hereinabove mentioned: "Bills of exceptions are to be presented to the judge who presided at the trial within the time prescribed by law, and in case of his absence they may be filed with the clerk, whose duty it shall be to present the same to the judge at the earliest opportunity, and shall endorse thereon the day and hour of filing."

Wherefore, it follows as conclusions of law from the above findings of fact—

(1.) That the rights of this plaintiff in and to said policy of insurance and the moneys due thereunder never passed to said Henri G. McGrew, nor did he ever hold her rights or property in said policy or money, nor did said policy or the money due thereunder, nor this plaintiff's rights therein, ever become the property of said Henri G. McGrew.

(2.) That defendant is indebted to plaintiff upon said policy of insurance in the sum of five thousand dollars, together with interest thereon at the legal rate from the 9th day of February, 1895, and said plaintiff is entitled to judgment against the defendant for the sum of five thousand dollars, with interest thereon at the rate of seven per cent. per annum from the 9th day of February, 1895, and for her costs herein.

Let judgment be entered accordingly.

GEORGE H. BAHRS, *Judge.*

Dated October 11, 1897.

(Endorsed:) Filed Oct. 11, 1897. C. F. Curry, clerk. By T. C. Maher, deputy clerk.

22 (Title of Court and Cause.)

Judgment.

This case came on regularly for trial, H. G. Platt, Esq., appearing as counsel for the plaintiff, and Warren Gregory, Esq., appearing for defendant, a trial by jury having been expressly waived by counsel for the respective parties. The case was tried before the court, sitting without a jury, whereupon witnesses on the part of plaintiff and defendant were duly sworn and examined, and certain documentary evidence was introduced. The evidence being closed, the case was submitted to the court for consideration and decision, and after deliberation thereon, the court delivers its finding and decision in writing, which is filed, and orders that judgment be entered in accordance therewith.

Wherefore, by reason of the law and the finding aforesaid, it is ordered, adjudged, and decreed that Alphonsine McGrew, plaintiff, do have and recover from The Mutual Life Insurance Company, of New York, a corporation, defendant, the sum of five thousand nine hundred and thirty-five and $\frac{30}{100}$ (5,935.30) dollars, with interest thereon at the rate of seven (7) per cent. per annum from the date hereof till paid, together with the said plaintiff's costs incurred in this action amounting to the sum of thirty-eight and $\frac{75}{100}$ (38.75) dollars.

Judgment recorded October 11, A. D. 1897, in Book 39, at page 229.

23 (Title of Court and Cause.)

Clerk's Certificate to Judgment-roll.

CITY AND COUNTY OF SAN FRANCISCO, *ss:*

I, C. F. Curry, county clerk of the city and county of San Francisco, State of California, and *ex officio* clerk of the superior court, do hereby certify the foregoing to be a true copy of the judgment entered in the above-entitled cause and recorded in Judgment Book 39 of said court at page 229. And I further certify that the foregoing papers hereby annexed constitute the judgment-roll in said cause.

Witness my hand and seal of said superior court this 11th day of October, A. D. 1897.

[SEAL.]

C. F. CURRY, *Clerk,*
By N. E. MAISON,
Deputy Clerk.

(Title of Court and Cause.)

Defendant's Engrossed Bill of Exceptions.

Be it remembered, in the above-entitled action, that said cause came on regularly for trial on the 13th day of May, 1897, before the Hon. George H. Bahrs, sitting without a jury; Messrs. Platt & Bayne appearing for plaintiff, and Messrs. Chickering, Thomas & Gregory appearing for the defendant; whereupon the following proceedings were had:—

The plaintiff, to sustain the issues upon her part, intro-
24 duced in evidence the policy of life insurance mentioned in the complaint, which said policy was in words and figures as follows, to wit:—

"No. 517,750.

"Man's life. Five years' distribution policy of the Mutual Life Insurance Company of New York.

"Age, 29 years. Amount, $5,000.

"In consideration of the application for this policy, which is hereby made a part of this contract, the Mutual Life Insurance Company of New York promises to pay at its home office in the city of New York, unto Alphonsine McGrew, wife of Henri C. McGrew, at Honolulu, in the county of Oahu, State of Hawaiian islands, if living, if not living, to his executors, administrators or assigns, five thousand dollars, upon acceptance of satisfactory proofs at its home office of the death of said Henri G. McGrew during the continuance of this policy, upon the following condition; and subject to the provisions, requirements and benefits stated on the back of this policy, which are hereby referred to and made a part hereof:—

"Annual premium $113.50.—The annual premium of one hundred and thirteen dollars and fifty cents shall be paid in advance

on the delivery of this policy and thereafter to the company,
25 at its home office in the city of New York, on the fourteenth day of September, in every year during the continuance of this contract.

"In witness whereof, the said Mutual Life Insurance Company of New York has caused this policy to be signed by its president and secretary, at its office in the city of New York, the fourteenth day of September, A. D. one thousand eight hundred and ninety-two.

"(Signed) RICHARD A. McCURDY, *President.*

"(Signed) A. S. GREEVE,
"*Acting Ass't Secretary.*

"The receipt of the first payment of premium hereon is acknowledged.

"W. G. EASTON, *Secretary.*"

The following provisions, requirements, and benefits are set forth on the back of said policy of insurance, to wit:—

"Payment of premiums.—Each premium is due and payable at the home office of the company, in the city of New York; but will be accepted elsewhere when duly paid in exchange for the company's receipt, signed by the president or secretary. Notice that each and every such payment is due at the date named in the policy is given and accepted by the delivery and acceptance
26 of this policy, and any further notice, required by any statute, is thereby expressly waived. That part of the year's premium, if any, which is not due and is unpaid at the maturity of this contract, shall be deducted from the amount of the claim. If this policy shall become void by non-payment of premium, all payments previously made shall be forfeited to the company, except as hereinafter provided.

"Dividends.—This policy is issued on the five-year distribution plan. It will be credited with its distributive share of surplus apportioned at the expiration of each five years from the date of issue. Only five-year distribution policies in force at the end of such term, shall share in such distribution of the surplus; and no other distribution to such policies shall be made at any previous time. All surplus so apportioned may be applied, at the end of such period, in payment of future premiums on this policy, if requested in writing; or may then be drawn in cash. The surplus may be applied at each distribution to purchase additional insurance without medical examination, provided such application of the surplus be elected, in due form, not less than two years before the end of the first dividend period of five years; otherwise, a satisfactory examination will be required for each such application of the surplus.

"Paid-up policy.—After three full annual premiums have
27 been paid upon this policy, the company will, upon the legal surrender thereof before default in payment of any premium, or within six months thereafter, issue a non-participating policy for paid-up insurance, payable as herein provided, for the amount re-

quired by the provisions of the act of May 21, 1879, chap. 347, Laws of the State of New York.

"Surrender.—This policy may be surrendered to the company at the end of the said first period of five years, and eighty per cent. of the reserve computed by the American table of mortality and four and one-half per cent. interest, and the surplus, as defined above, will be paid therefor in cash.

"Incontestability.—It is hereby further promised and agreed that, after two years from the date hereof, the only conditions which shall be binding upon the holder of this policy are, that he shall pay the premium at the time and place, and in the manner stipulated in said policy, and that the requirements of the company as to age, and military or naval service in the time of war shall be observed, and that in all other respects, if this policy matures after the expiration of the said two years, the payment of the sum insured by this policy shall not be disputed.

"Notice to the holder of this policy.—No agent has power, on behalf of the company, to make or modify this, or any contract
28 of insurance, to extend the time for paying a premium, to bind the company by making any promise, or by receiving any representation or information not contained in the application for this policy.

"Assignments.—The company declines to notice any assignment of this policy until the original copy thereof shall be filed in the company's home office. The company will not assume any responsibility for the validity of an assignment."

And thereupon, the plaintiff rested upon the admissions in the answer.

The defendant, to sustain the issues on its part, thereupon introduced the following testimony, which, by stipulation of the parties, had been agreed to be true, subject to any objections thereto which might be made at the trial.

I.

That prior to February 8, 1894, one Charles L. Carter, of the Republic of Hawaii, was duly appointed the guardian of the person and property of one Henri G. McGrew, a person *non compos mentis*, and continued to hold and exercise such office of guardian at the date of filing the libel for divorce, and proceedings thereon, hereinafter mentioned.

II.

That on the 8th day of February, 1894, the said C. L. Carter, guardian as aforesaid, on behalf of the said Henri G. McGrew,
29 did file in the circuit court of the first judicial circuit of the Republic of Hawaii, a libel praying for a divorce from the said Alphonsine McGrew, on the ground of adultery of the said Alphonsine McGrew.

III.

That on the 8th day of February, 1894, the said Charles L. Car-

ter and the said Henri G. McGrew, and said Alphonsine McGrew were all domiciled in said Honolulu.

IV.

That on the 9th day of February, 1894, the said Carter and Henri G. McGrew, and Alphonsine McGrew, still being domiciled in said Honolulu, personal service was made on the said Alphonsine McGrew of a copy of the said libel, and a summons to appear and answer the same in the said circuit court of the Republic of Hawaii.

That the aforesaid libel was in the words and figures following, to wit:

"(Title of Court and Cause.)

"To the Honorable W. A. Whiting, first judge of the circuit court of the first circuit:

"Your libellant, Henri G. McGrew, a person *non compos mentis*, by his guardian, Charles L. Carter, respectfully represents:

"That he was legally and duly married to Alphonsine McGrew, defendant herein, on or about the 25th day of March, A. D., 1890, at Paris, France, and has conducted himself as a dutiful husband should, last living with said defendant as her husband in said Honolulu.

"That said defendant, regardless of her marriage vows and duty, within two years last past, has been guilty of adultery with one Dr. M. Miner, V. S., and one Mr. E. B. Pomeroy, and divers other men whose names are to your libellant unknown in said Honolulu, and also has been guilty of adultery within the last year past with divers men whose names are to your libellant unknown, in the city of San Francisco, State of California, one of the United States of America.

"That libellant and respondent have one child named Reynold Brodie, aged 3 years.

"That on the 23rd day of January, A. D. 1894, the said Henri G. McGrew, was, by the circuit court of the first circuit, found to be a person *non compos mentis*, and the said Charles L. Carter was appointed guardian of the person and property of said Henry G. McGrew.

"Wherefore, your libellant prays that defendant may be summoned to appear and answer this complaint at the next term of this court.

"That he may be divorced from the bonds of matrimony from said defendant.

"That the custody of said child may be awarded him.

"(S'g'd) HENRI G. McGREW,
"By his guardian, CHARLES L. CARTER.

"A. S. HARTWELL,
"CARTER & CARTER,
"*For Libellant.*

31 "HAWAIIAN ISLANDS, } ss:
Island of Oahu, }

"Charles L. Carter being duly sworn, deposes and says that he is guardian of Henri G. McGrew, a person *non compos mentis;* that affiant is definitely informed and believes, that he has good cause, and reason to believe, and does therefore aver upon his information and belief, that all matters and things set forth in the foregoing libel for divorce are proved.

"(S'g'd) CHARLES L. CARTER.

"Subscribed and sworn to before me this 8th day of February, A. D. 1894.

"(S'g'd) HENRY SMITH, *Clerk.*"

That thereafter, to wit: on February 21, 1894, the said plaintiff made the following motion in said court—

"(Title of Court and Cause.)

"*Motion for Attorneys' Fees.*

"Now comes Alphonsine McGrew, sometimes known as Sinette McGrew, the libellee in the above libel, and respectfully represents to the court that she has no private means of her own, and that she is desirous of contesting the said libel, and requires legal advice and assistance in the premises.

"And this libellee represents that she is advised by counsel, and is aware of her own knowledge, that her defense of the said libel
32 will involve an unusual amount of professional labor, particularly in the preparation of commissions and interrogatories and cross-interrogatories for witnesses residing in America, whose testimony will be essential to the proper and adequate defense of the said libel; and that in view of such fact, not only a liberal allowance for counsel fees, but also an allowance for general expenses liable to be required in the premises, should be made herein.

"Wherefore, this libellee moves the court here that the said guardian of the said Henri G. McGrew be ordered to pay to the counsel of this libellee such sums, as in the opinion of the court will be adequate, for the purposes herein set forth.

"Dated this 21 of February, 1894.

"(S'g'd) SINETTE McGREW.
"(S'g'd) C. W. ASHFORD,
"F. M. WAKEFIELD,
"*Counsel for Libellee.*

"HAWAIIAN ISLANDS, } ss:
City of Honolulu, }

"Alphonsine McGrew, sometimes known as Sinette McGrew, having been duly sworn, deposes and says that the matters of fact alleged in the foregoing instrument in support of the foregoing motion are true, of her own knowledge.

"(S'g'd) SINETTE McGREW."

(Duly verified.)

33 That, thereafter, the following petition was made in said court and cause:—

"(Title of Court and Cause.)

"*Petition for Temporary Alimony.*

"And now comes the said Alphonsine McGrew, libellee herein, by C. W. Ashford and F. M. Wakefield, her attorneys, and moves the court that an order be entered herein commanding the guardian of the libellant herein to pay to the attorneys of said libellee, for the use, support, and maintenance of said libellee the sum of twenty-five dollars ($25.00) per week, or such other sum as to the court shall seem just, by way of temporary alimony herein, and that such payments shall date from the 5th day of April, 1894.

"This motion is based upon the records and files herein, and upon the affidavit of C. W. Ashford, attached hereto and made a part hereof.

"Dated this 20th day of June, 1894.

"(S'g'd) C. W. ASHFORD,
"F. M. WAKEFIELD,
"*Attorneys for Libellee.*"

And thereupon the following order was made in said cause upon said petition:—

"(Title of Court and Cause.)

"*Order for Temporary Alimony.*

"Upon hearing the petition of said libellee for an order for the allowance to her of a sum for temporary alimony herein, and,
34 after argument by the counsel for the respective parties hereto,—

"It is ordered, that C. L. Carter, guardian of the said libellant herein, do pay to the attorneys for said libellee the sum of twenty — ($20) per week, as and for such alimony; the periods of such payments to begin with the 18th day of June, instant; first payment June 25th.

"Dated this 23rd day of June, 1894.

"(S'g'd) HENRY E. COOPER,
"*2nd Judge, First Circuit Court.*"

V.

That the said Alphonsine McGrew, named as libellee in said libel of divorce, upon whom such service was made, is the same person who is now the plaintiff in this cause.

VI.

That, under the law of the said Republic of Hawaii, the said circuit court is a court having jurisdiction to entertain libels for divorce and to issue summons to libellees named in any libel filed in such court.

VII.

That the said Henri G. McGrew died at Honolulu on the 22nd day of October, 1894, having been continuously within the jurisdiction of said court since the filing of said libel and service of
35 libel and summons on the said libellee, and was domiciled within the jurisdiction of the said court at the time of his death, aforesaid.

VIII.

That, on the 11th day of April, 1894, the said Alphonsine McGrew demurred to the said libel, on the ground that the said Henri G. McGrew was *non compos mentis*, and that said Carter, guardian as aforesaid, had no authority to bring a libel for divorce on his behalf.

IX.

That thereafter, joinder was made by the libellant in said demurrer, and on May 19th, 1894, said demurrer was duly argued before the said circuit court.

X.

That on June 1st, 1894, by consent of parties, the said court, reserved to the consideration and decision of the supreme court of the Republic of Hawaii, the sufficiency of said demurrer.

XI.

That on July 31st, 1894, an opinion and decision was duly rendered by the said supreme court upon the said reserved question concerning the said demurrer, holding that the demurrer was not well taken.

XII.

That on the 6th day of August, 1894, in pursuance of said
36 opinion of said supreme court, the said circuit court overruled the said libellee's said demurrer.

XIII.

That on the 10th day of August, 1894, the said libellee, by C. W. Ashford, her attorney, filed an answer in the said divorce case, denying all the allegations of the libel.

XIV.

That on the 18th and 20th days of August, 1894, the said divorce case was heard by the said circuit court, and, after production of evidence by both parties and argument by counsel, on the 23rd day of August, 1894, a decision was rendered by the said circuit court granting the prayer of the said libel of the said Henri G. McGrew against the said Alphonsine McGrew on the ground of the adultery of the said libellee.

XV.

That on the 24th day of August, 1894, an order was signed by Henry E. Cooper, judge of the said circuit court, presiding at said circuit court, in said divorce suit, ordering a decree of divorce to be entered in favor of said Henri G. McGrew against the said Alphonsine McGrew on the ground aforesaid.

XVI.

That on the said 24th day of August, 1894, a decree of di-
37 vorce was signed by the said Henry E. Cooper, as judge of the said circuit court, which said decree was as follows:—

"(Title of Court and Cause.)

"*Decree of Divorce.*

"The above-entitled cause came on for hearing before the Hon. H. E. Cooper, 2nd judge of the said first circuit court, on Saturday, the 18th day of August, A. D. 1894, and afterwards by adjournment on the 20th and 21st days of said August, and, after hearing and considering the evidence adduced and the arguments of counsel, as well for the libellant as for the libellee, it was, on the 24th day of said August, ordered by the said Hon. H. E. Cooper that a decree of divorce from the bond of matrimony be entered in favor of the said Henri G. McGrew, for the cause of the adultery of the said Alphonsine McGrew.

"Wherefore, it is ordered, decreed, adjudged, and considered by the court here, that the said libellant, Henri G. McGrew, be, and hereby is, divorced from the bond of matrimony heretofore formed and entered into between him, the said Henri G. McGrew, and her, the said Alphonsine McGrew.

"By the court:

"(S'g'd) HENRY SMITH, *Clerk.*

"Honolulu, August 24th, 1894."

38 XVII.

That J. O. Carter, of said Honolulu, is the duly appointed administrator of the estate of Henri G. McGrew, deceased, and that as such administrator he brought suit, after the death of said Henri G. McGrew, in the courts of the Republic of Hawaii, against the said Mutual Life Insurance Company upon the same policy of insurance which is the subject of this suit, and recovered judgment thereon, which judgment was sustained by the supreme court of the Republic of Hawaii, and a motion for rehearing of said cause, made by the said Mutual Life Insurance Company, was denied by the said supreme court, and the said Mutual Life Insurance Company of New York, thereupon paid to said J. O. Carter, administrator as aforesaid, the full amount of the $5,000 due by the said company upon said policy of insurance, and the said J. O. Carter thereupon executed to the said company a full receipt and release of all claim on account

and by reason of the said policy, and delivered said policy to said insurance company.

The introduction of which said testimony, appearing in the paragraph designated XVII heretofore, was objected to by counsel for plaintiff upon the ground that the same was incompetent, irrelevant, and immaterial, which said objection was by the court sustained, and an exception allowed said defendant, which said exception is hereby designated exception No. 1.

39 XVIII.

That a volume entitled "Compiled Laws of the Hawaiian Kingdom," and known as "Compiled Laws of 1884;" and a volume entitled "Laws of Her Majesty Kiliuokalani, Queen of the Hawaiian Islands, passed by the Legislative Assembly at its session, 1892," and known as "Session Laws of 1892;" and also volumes I to IX of the "Reports of Decisions Rendered by Supreme Court of the Hawaiian Islands," are each published by authority, and are received and used in the courts of the Republic of Hawaii as evidence of the laws of said republic.

That by section 1331 of the aforesaid Compiled Laws of the Hawaiian Kingdom, which said law was in force at the time the aforesaid action for divorce was commenced, and at all times subsequent thereto, up to the 12th day of May, 1896, it was provided:—

"When a divorce is decreed for the adultery or other offense amounting thereto, of the wife, the husband shall hold her personal estate forever, and he shall hold her real estate so long as they shall live; and if he shall survive her, and there shall have been issue of the marriage born alive, he shall hold her real estate for the term of his own life, as a tenant by the courtesy; provided, that the court may make such reasonable provision for the divorced wife,
40 out of any real estate that may have belonged to her, as it may deem proper."

XIX.

That the supreme court of the Hawaiian islands is the court of appellate jurisdiction of said republic, and the opinions of said court, in said actions of McGrew *v.* McGrew, and Carter *v.* Mutual Life Insurance Co., and the opinion rendered upon the motion for rehearing in the last-named case, are the opinions reported in the aforesaid Hawaiian reports, under the respective titles of said cases.

The plaintiff made a separate objection to each of the paragraphs 1, 2, 4, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, and 19, and also that portion of paragraph 18 relating to section 1331 of the Compiled Laws of the Hawaiian Kingdom. The said objections were made upon the ground that the said matter, and all of it, was incompetent, irrelevant, and immaterial, which said objections were all overruled by the court, and an exception in each case allowed said plaintiff.

The defendant here rested.

The plaintiff thereupon introduced in rebuttal the following testimony which, by stipulation, had been agreed to be correct, subject to any objections thereto made at the trial:—

41 I.

That on the 27th day of August, 1894, the libellee, by C. W. Ashford, her attorney, filed an exception to the said decree, and gave notice that the said libellee would carry her exceptions to the supreme court from the said decree of the said circuit court; which notice was in accordance with the rules of the said circuit court, and was filed in said circuit court, within the time by the said rules allowed for filing said notice.

II.

That on the 1st day of October, 1894, the libellee's bill of exceptions in said divorce case was filed in the said circuit court by her attorney, C. W. Ashford, within the time prescribed by law, but without the allowance of the same by the said judge of said circuit court, or any judge; and that said bill of exceptions is still on file in said cause in said circuit court, and has not been certified, settled, signed, or allowed by said circuit court, or by any judge thereof, or otherwise perfected and removed into the supreme court, or removed from or out of said circuit court; and that said exceptions have not yet been directly heard, determined, or disposed of, in or by any court of the Republic of Hawaii.

The said bill of exceptions was in the words and figures following, to wit:—

42 "HAWAIIAN ISLANDS:

"In the Circuit Court for the First Circuit, August Term, 1894.

"HENRI G. MCGREW, by CHARLES L. CARTER, His Guardian, Libellant,
vs.
"ALPHONSINE MCGREW, Libellee.

"*Libellee's Bill of Exceptions.*

"Be it remembered that, on the 20th day of July, 1894, the decree of the supreme court was filed in this cause, wherein and whereby the demurrer of the libellee to the authority of libellant's guardian to maintain this suit was overruled.

"And that, on the 30th day of said July, said libellee filed herein her motion for an order to the libellant to furnish her with specifications of the charges of adultery alleged in the said libel herein, together with a notice of hearing of said motion, at 10 o'clock, on the 31st day of said July.

"That said motion was not heard at the time so noticed, for the reason that the counsel for libellant induced the counsel for the libellee to forego presenting the same, by promising that he,
43 the counsel for libellant, would, as soon as practicable, furnish the specifications requested in said motion.

"That on the third day of August, 1894 (on which date libellee's counsel had again notified counsel for libellant to appear upon said motion for specifications, owing to the same not having been then

furnished to libellee), it was further agreed between counsel herein, that said motion would not be opposed, and that such specifications as requested therein would be furnished to libellee, without any order therefor.

"That on the fourth day of August, 1894, counsel for libellant further agreed to furnish such specifications during said last-mentioned day (if possible), but did not furnish the same, or any specifications herein, until the 6th day of August, on which last-named date, libellant's counsel served libellee's counsel with, and filed, the specifications marked as filed herein on said date.

"That on the 7th day of said August, counsel for libellee filed and served libellant's counsel with a copy of libellee's exception to the specifications, so, as above, furnished and filed herein, together with a motion for an order for the giving of further specifications in the premises, and notice of a hearing on said motion at 10 o'clock on the 8th day of said August.

"That said last-mentioned motion was not presented and
44 argued at the time last aforesaid, or at all, for the reason that libellant's counsel, upon being served with notice thereof, undertook and agreed to and with libellee's counsel, to furnish further specifications of said charges, as requested in said last-mentioned motion, without an order of the court in the premises.

"That on the 9th day of said August, in the afternoon of said day, counsel for libellant served libellee's counsel with, and filed, the amended specifications on said charges, now on file herein.

"That on the 10th day of said August, libellee filed, and served libellant's counsel with a copy of her answer to the libel herein, and in like manner filed, and served a copy, of her motion for a commission or commission to take the testimony of said libellee, and of the person with whom, in said libel and specifications, libellee was charged to have committed adultery, viz: M. L. Miner and E. B. Pomeroy, all of whom, as shown by the record herein, were then residing abroad, and the last two named of whom had not been in Hawaii since the filing of the libel herein, and that notice for hearing of said motion for such commissions, at 10 o'clock on the 11th day of said August was, at the same time, served upon counsel for libellant.

"That on the said 10th day of August, counsel for libellant filed and served their motion to set this cause for trial, together with notice of hearing of same at 10 o'clock on said 11th day of August.

45 "That libellant's said motion to set the cause for hearing, and libellee's said motion to issue such commissions, as aforesaid, came on for hearing together before Judge Cooper of said court, on said 11th day of August, whereupon the court overruled said motion to issue, such commissions, and refused to issue, or to oder the same or any commission as in said motion requested, and granted said motion to set the cause for trial; and set the same for hearing and trial on the 18th day of said August; and that libellee, by her counsel, duly excepted to the order so overruling her said motion for commissions to take testimony abroad, and to the order setting

said cause for hearing, without having obtained the testimony of said Miner and Pomeroy.

"That the hearing of said cause, in pursuance of said order setting the same, came on before the said judge on the said 18th day of August, and was thence continued to the 20th, and thence to the 21st day of said August, on which last-named date, (the hearing and argument having been concluded), reserved its decision and judgment herein.

"That on said hearing, the libellant's counsel called to the stand one Marie, or Mary Silva, a child of 13 years, who, upon being examined touching her competency as a witness, and her understanding of the nature of an oath, gave answer as per the transcript thereof at pages 28, 29, 30, and 31 of the evidence herein; and counsel for libellee objected to her being sworn as a witness herein, on the ground that she was incompetent as a witness, in not understanding the nature of an oath. But the court overruled said objection, and libellee, by her counsel, excepted.

46

"That on the 23rd of August, the court rendered its decision in favor of libellant herein, and that on the 24th day of said month, a decree of divorce, as filed herein, was made and entered, to which libellee, by her counsel, on the 27th of said August, filed her exceptions.

"And libellee alleges in particular, that said decree is not warranted by the law and the evidence adduced herein; and that no legal evidence was adduced to prove a legal marriage of the parties hereto, but that, on the contrary, the evidence showed no marriage which, at the time and place of its alleged celebration, was valid by the law of the nation in which it is alleged to have been celebrated, to wit: the Republic of France. And that no sufficient evidence was adduced upon which to base a decision, or finding, that any charge of adultery, alleged against said libellee in said specifications, had been proven herein.

"All records, files, exhibits and papers herein, and the transcript of the evidence adduced at said hearing and signed by the stenographer, are hereby expressly referred to and made a part of this bill of exceptions.

47

"Wherefore, and for the errors of the trial court herein, the libellee submits that the said libel should be dismissed, for want of evidence of the marriage alleged in said libel; and for want of sufficient evidence of any of the offenses charged against libellee therein; or, in the alternative, that said decree should be vacated, and a new trial ordered, for the error of said court, in refusing to order, or allow commissions to take the testimony of persons residing abroad, and to testify, as a wi ness herein, the said Marie, or Mary Silva.

"Dated this 1st day of October, 1894.

"(Signed) C. W. ASHFORD,
"*Attorney for Libellee.*"

"I allow this bill of exceptions, this — day of October, 1894.

——— ———,
"*Judge First Circuit Court.*"

The defendant objected to the introduction of the said bill of exceptions, upon the ground that the same was incompetent, irrelevant, and immaterial to any issue involved in this case, and upon the further ground, that the court of last resort in Hawaii had already passed upon the finality of said judgment; which objection
48 was overruled, and an exception allowed said plaintiff; which said exception is hereby designated exception No. 2.

III.

That the judge who tried said cause, to wit: Henry E. Cooper, was absent from the Republic of Hawaii on the 1st day of October, on which day the said libellee filed her bill of exceptions in said cause, and did not return to the Republic of Hawaii until the 25th day of October, 1894, the said libellant, Henri G. McGrew, having died on the 22nd day of October, 1894.

That said Henry E. Cooper resigned his office as judge of said circuit court on the 6th day of November, 1895.

IV.

That, on the 11th day of January, 1897, the said Alphonsine McGrew, by her attorney, A. S. Humphreys, made a motion in said supreme court to place the said exceptions on the calendar of said supreme court for consideration, and that the court proceed to hear the same.

Said motion, and the affidavit of C. W. Ashford, thereto attached, are as follows:

"(Title of Court and Cause.)

"*Motion.*

"And now comes the defendant in the above cause, and
49 moves this honorable court to place said cause upon the calendar of this court; to settle and allow the bill of exceptions filed in said cause, and to proceed to hear said cause upon said bill of exceptions, when so settled and allowed. This motion is based upon defendant's bill of exceptions filed in said cause, and upon the several pleadings and papers filed therein, and more particularly upon the affidavit of C. W. Ashford, filed herewith and attached hereto.

"(S'g'd) ABRAM STEPHANUS HUMPHREYS,
"*Attorney for Defendant.*

"(Title of Court and Cause.)

"*Affidavit of Clarence W. Ashford.*

"STATE OF CALIFORNIA, }
"*City and County of San Francisco,* } *ss:*

"Clarence W. Ashford, having been duly sworn, deposes and says:—

"That he was attorney of record for the above-named libellee, in

the defense of the above-entitled suit, and, as such attorney, had charge of the defense thereof, and personally appeared therein and conducted the same from time to time, from the institution of said suit to the death of said Henri G. McGrew, on or about Oct. 22nd, 1894.

"That, as such attorney, this deponent presented to, and filed with the clerk of said court, within the time prescribed there-
50 for by law and by the stipulation of parties on file herein, a bill of the exceptions noted by or on behalf of said libellee to the rulings of said court upon and during the trial of this cause, and to the decree signed by said court, and on file herein.

"That, at the date of the filing and of said bill of exceptions, the judge before whom all the proceedings in this cause had been had, and who had held the trial, and signed the decree herein, viz: the Honorable Henry E. Cooper, was absent from the Hawaiian islands, on a visit to the State of California, and did not return to the Hawaiian islands until after the death of said Henri G. McGrew. That, during the said absence of said judge, the supreme court of the Hawaiian islands refused an application by the attorney and guardian of said libellant, to place the exceptions above mentioned upon the calendar for hearing at the September, 1894, term of said supreme court, then in session, and ruled, in effect, that said exceptions could not be perfected or duly certified until the return to Hawaii of said judge who had tried said cause.

"That, for the reasons above set forth, this deponent felt he had done all things incumbent upon him in the premises, to bring said exceptions up for review by said supreme court, and felt that noth-
ing remained for him to do in the premises, except to await
51 the return of said judge, Henry E. Cooper, which deponent accordingly did.

"That, on or about the 23rd day of October, 1894, this deponent met Charles L. Carter, the attorney and guardian of said libellant, in the office of the clerk of this court, when said Carter filed a suggestion, or an affidavit, of the death of said libellant; that deponent then conferred with said Carter concerning the status of this cause as affected by the then recent death of said libellant; and that, in said conversation, said Carter agreed with this deponent that nothing remained to be done in said cause, for the reason that the subject-matter of the suit, to wit: the marriage theretofore existing between the parties hereto, had been dissolved by the death of said libellant, and that the authority of said Carter to act in the premises as guardian of said libellant had also been thereby dissolved and terminated, and that there was no one *in esse* with authority to take or resist any further action in the matter on behalf of said libellant, and that the suit itself was terminated, for the want of parties, and because of the dissolution and extinction of the subject-matter thereof, to wit: the status theretofore existing between the parties hereto.

"That, thenceforward to the time of the death of said Carter, it

was understood by this deponent (and, also, as he believes,
52 by said Carter), and was tacitly agreed between them, that said suit was absolutely terminated, and that it had been abated, beyond the power of revival, by the death of said libellant; and that this deponent so continued to believe, thence, to the present time, and still so believes.

"And so deponent sayeth, for the reasons above set forth, he took no further steps to bring said exceptions before said supreme court, after the filing of the bill of exceptions as above described. And further, deponent sayeth not.

"(S'g'd) CLARENCE W. ASHFORD.

"Subscribed and sworn to before me, this 30th day of October, 1895.

"(S'g'd) N. E. W. SMITH,
"*Notary Public.*"

The defendant objected to the foregoing motion, and also to the foregoing affidavit, on the ground that the same are incompetent, irrelevant, and immaterial, which objection was overruled by the court, and an exception allowed said defendant, which exception is hereby designated exception No. 3.

V.

That, at the time the bill of exceptions was presented, as aforesaid, the following rule of practice of the said circuit court of the Hawaiian islands was in force, to wit;—

53 "Bills of exceptions are to be presented to the judge who presided at the trial, within the time prescribed by law, and in case of his absence, they may be filed with the clerk, whose duty it shall be to present the same at the earliest opportunity, and he shall endorse thereon the day and hour of filing. Upon the presentation or filing of a bill of exceptions, counsel shall at once notify adverse counsel, who shall have five days in which to propose amendments to the bill, which shall be presented to the judge, or filed with the clerk, as above provided, and notice shall be given to the adverse party. Either party may signify his approval of, or consent to, bills of exceptions and amendments thereto, by endorsing the same on such bill or amendment."

The defendant objected to the introduction of the aforesaid rules of practice, upon the ground that the same were incompetent, irrelevant, and immaterial, in that the supreme court of Hawaii had already passed upon their applicability to the present case, and that their decision is conclusive upon this court.

The objection was overruled, and an exception allowed defendant, which exception is hereby designated exception No. 4.

The plaintiff thereupon introduced in evidence the following portion of the "Compiled Laws of Hawaii," which said law was
54 in force at all the times since the commencement of said divorce action, and is now in force. It is as follows:

"Any party aggrieved by any order or decision of the circuit court

may except thereto, and his exceptions shall be duly noted, and certified to the supreme court, and no order or decree for a divorce shall be made absolute, until such exceptions shall have been disposed of. Said exceptions shall be argued and determined in the supreme court, sitting *in banco*, and if the court *in banco* shall be of opinion that the order or decision excepted to in said circuit court was erroneous, they shall so certify, and thereupon, the case shall be heard anew."

The defendant objected to the introduction of the law last aforesaid, upon the ground that it was incompetent, irrelevant, and immaterial, because the supreme court of Hawaii had already passed upon the finality of this divorce decree, which said objection was overruled, and an exception allowed defendant, which said exception is hereby designated exception No. 5.

ALPHONSINE McGREW was thereupon called, and testified as follows:

I was the wife of Henri G. McGrew, living in Honolulu.

Q. When did you last reside there?

A. I left Honolulu on the 5th day of April, 1894.

55 To which answer counsel for defendant objected, and asked that the same be stricken out on the ground that it was not responsive, and immaterial, irrelevant, and incompetent to any issue involved in the pleadings of this case; which objection was by the court overruled and exception noted, hereby designated as exception No. 6.

I did not come to California for the purpose of getting a divorce from my husband.

Thereupon, counsel for defendant objected to any testimony as to the evidence of the change of residence on the part of Mrs. McGrew prior to her husband's death, upon the ground that her domicile remained that of her husband, which objection was by the court overruled and exception noted, hereby designated as exception No. 7.

Witness continuing: We came to California in 1893, for my husband's health and returned there on the 20th December of that year. Mr. Carter met us at the steamer. He said he had been appointed the guardian of my husband. I had a home in Honolulu. When we came here to California, our home was rented, but the party left before we got back. I wanted to go to my house, but Mr. Carter refused to let me go in. It was closed and he had the key.

56 He said for me to go to the hotel. When I went to the hotel, the papers were served on me, and they told me they wanted to take my husband to the hospital, that he was *non compos mentis*, and that he would perhaps get better. He had softening of the brain. Although he knew what was going on, after his father spoke to him, he decided to go to the hospital for a few days. I was left in the hotel with my child; no money, no home. Friends of mine asked me to go and live with them. I staid with them until the 5th of April, when I had to leave Honolulu. I thought my child would

be taken away from me. After my husband was taken to the hospital, I asked to go to my home. I was not allowed by Mr. Carter to enter my home there. My husband wanted to go with me to our home that we had occupied before, but Mr. Carter would not let him go. Mr. Carter left my husband with me for a few days, and then took him to the hospital. Mr. Carter sold everything in my home, and only allowed me a piano. He would not allow me that only because it was mine, and he could not keep it. I sold my piano and with the money paid my passage to this city.

Q. Please state why you left Honolulu?

Mr. GREGORY: I object to that question as immaterial, irrelevant, and incompetent.

The COURT: The objection overruled.

57 To which ruling an exception was duly noted, which is hereby designated as exception No. 8.

A. I left Honolulu because I had no home and was afraid they would take my child away from me.

Q. When you left Honolulu, will you please state what was your intention as to returning in time?

Mr. GREGORY: I object to the question as incompetent, irrelevant, and immaterial, because she was a married woman at that time and her intentions as to her domicile was of no importance, since her domicile remains that of her husband, and she has already testified that she did not leave Honolulu for the purpose of divorce proceedings.

Which objection was overruled and an exception noted, hereby designated as exception No. 9.

A. My intention was to come up here and make my home.

WITNESS continuing: The divorce suit had been commenced before I left Honolulu. I have resided in San Francisco ever since I landed here in April, 1894, and I have not been back to Honolulu.

Cross-examination:

I went to Honululu in May, 1890, and resided there con-
58 tinuously until the 5th day of April, 1894, although I was temporarily here with my husband in the meantime. I left there in May, 1893, with my husband, and returned to Honolulu on December 22, 1893. We came here for the purpose of his health. He was a practicing physician there. He had lived there all his life, with the exception of the time when he was away at college.

Q. He had been a kind and indulgent husband with you, and had always provided you with a comfortable home in Honolulu, had he not?

Mr. PLATT: We object to that question as incompetent, irrelevant, and immaterial.

The COURT: Objection sustained.

To which ruling an objection was noted, hereby designated as exception No. 10.

Q. Did your husband ask you not to leave him?

Mr. PLATT: We object to that question as incompetent, irrelevant, and immaterial.

The COURT: Objection sustained.

To which ruling an exception was noted, hereby designated as exception No. 11.

Q. Did the guardian himself, at any time, ask you to leave the hotel?

A. No, sir.

Q. Had there been any estrangement between the doctor's family and yourself before you left Honolulu, on April 5, 1894?

59 Mr. PLATT: I object to that question as incompetent, irrelevant, and immaterial.

The COURT: The objection is sustained.

To which ruling an exception was noted, hereby designated as exception No. 12.

A. I don't know whether Mr. Carter told me, at the time he met us at the wharf, that he had been appointed the guardian of my husband or not. My husband remained at the hotel with me for a few days, and then was taken away by Mr. Carter. Mr. Carter said that he was my husband's guardian, and that he needed care, and should be taken to the hospital. He was not taken to an asylum, but to a hospital. I knew then that he was a sufferer from softening of the brain. I have been in California ever since I left Honolulu, although I intended to go to Florida for a short visit. I would like to pay my parents a visit, and was also invited to go to New Orleans. I would like to make my parents a visit in France, but have to come back here again. I am not engaged in any business or profession. My home is No. 212 Powell street, San Francisco.

Q. Why was it that you stayed in San Francisco when you came from Honolulu?

A. Why, as I did not have the money with which to visit France, I then wanted to make my home here.

60 Q. Did you not state, Mrs. McGrew, in your deposition formerly taken in this case, as follows: "Will you state what was your object, if any, in leaving Honolulu at that time? A. I left Honolulu because I was afraid I could not keep my child." Did you so testify?

A. Yes. The first thing was that I had no home.

Q. Did you ask the court to pay you any money in the divorce action which was pending in Honolulu?

A. I do not know, sir. I do not understand. I received no money, and lived with friends.

Q. In this divorce action which was brought against you by Mr. McGrew, was no money paid you during the progress of the litigation?

A. I think for about two or three months some little money was sent to me.

Q. They sent it for you?

A. No, for the child. They sent it to me here, after I left Honolulu. I received no money there.

Q. Did you ever make any application to your husband personally to come and live with you?

A. Why, my husband was not allowed even to see me. I went to see him. He was then in the hospital.

Q. The question is, if you made any application to him to go and live with you?

A. He didn't understand.

61 He knew me, and he knew his child, because he often asked me what he was doing in the hospital. I asked him if he could understand, and if he knew he had brought an action of divorce against me, but he did not understand; he did not know. I asked him to come and live with me again, but he didn't understand.

Q. And you say he didn't understand you?

A. Well, I asked him if he knew he could understand me. I said, "Will you come with me?" He answered he would come with me, but he didn't understand why he had to stay in the hospital.

Q. Did you make any application to Mr. Carter for money?

A. Yes, sir; but he said he had no money of my husband's.

Q. Do you know whether Mr. Ashford made any application for money for you?

A. I do not know.

Q. Did you ask Mr. Carter to give you a house in Honolulu to live in?

A. No, sir; I asked him to give me back my own home, there.

Q. Did you ask him to give you a home?

A. He would not do so.

Q. Did you ask him?

A. Yes, sir. When he took my husband, I asked him where I was to go, and he said anywhere I liked. I asked him if I ought not to

62 have a home to take my child to. He answered that he could not do anything for me. The family of Dr. McGrew and myself have not spoken for a long time. The house in which my husband and I had lived was a rented house. I have not carried on any correspondence with my husband's family since I left. I asked him to come and live with me, because I wanted to take care of him, and have him with me; he was my husband. Mr. Carter, the administrator, asked me to give up the child, and said he would give me enough money to go to Europe to my parents; and I said they could keep the money and I would keep my child. This is the only child my husband and I ever had.

Redirect examination:

Q. Did you bring this policy of insurance with you when you came up from Honolulu?

A. I did not have it; Mr. Carter had it. He took it out of my husband's safe, while we were in Honolulu. I objected, and told him he had no right to take anything that was in the house; that

they belonged to my husband. He said, at the time, that he was the doctor's guardian. I got about $300 from the court for the support of my child in three years.

Recross-examination:

Q. Did you have any home in San Francisco at the time you left Honolulu to come here?

A. No, sir.

63 Q. What made you think that you could get a home here in San Francisco?

Mr. PLATT: I object to that question, as immaterial and irrelevant. She said she came up here to make her home.

The COURT: The objection will be sustained.

To which ruling an exception was noted, hereby designated exception No. 13.

Q. You say the reason why you left Honolulu was because you had no home there?

A. No; I had no home there.

Q. Did you go out in Honolulu and try to rent a house to live in?

A. No.

Q. Did you go to the hotel and ask them to send the board bills to your husband?

A. Mr. Carter came out in the paper that nothing was to be delivered to me—not to give me any credit.

Mr. GREGORY: I ask that the answer of the witness be stricken out as not responsive, and on the further ground that a notice inserted in the paper by Mr. McGrew that he would not be liable for credit extended to his wife, is of no effect.

The COURT: They affect her mind, and the condition of her mind is material.

To which ruling an exception was duly noted, hereby designated exception No. 14.

64 Witness continuing: Mr. McGrew and I were married in Paris, in 1890.

The defendant, in surrebuttal, introduced the following testimony:

That, on the 2nd day of October, 1894, C. L. Carter, as the guardian of Henri G. McGrew, a person *non compos mentis*, did, in the said divorce action of McGrew *v.* McGrew, file a motion in the supreme court of Hawaii, requesting that the exceptions theretofore filed on the 1st day of October, be put on the calendar of the said supreme court for hearing.

That the said C. L. Carter then and there offered to waive the facts that the said bill of exceptions had not been allowed by the said trial judge on the 2nd day of October, he being then absent from the Republic of Hawaii, which motion was opposed by the said C. W. Ashford, attorney for the said Alphonsine McGrew.

That on the 4th day of October, 1894, the said supreme court

overruled the motion of said Carter to put the said divorce proceedings on the calendar for hearing, on the ground that no bill of exceptions has been signed by the judge presiding at the trial of the libel for divorce.

That said bill of exceptions were never allowed by the judge presiding at the term of said circuit court, who heard the trial of the said libel for divorce, nor by any other judge of said court, or
65 any court, up to the present; nor has any request, or attempt, ever been made for such allowance.

That on the 27th day of said January, 1897, the said supreme court refused to place said bill of exceptions on the calendar of said supreme court, for the reasons set forth in the opinion of the said circuit court, then rendered, which said opinion was as follows:

"(Title of Court and Cause)

"*Motion to Place on Calendar.*

"Submitted January 19, 1897; decided January 27, 1897.

"Frear and Whiting, J. J., and Cecil Brown, Esq., of the bar, in place of Judd, C. J., disqualified.

"Motion to place cause on calendar and settle bill of exceptions denied, the bill not having been refused allowance by the trial judge.

"Opinion of the court, by FREAR, *J.*:

"Opinion of the court, by WHITING, *J.*:

"This is a motion made on behalf of the libellee, to place this cause on the calendar, to settle and allow a bill of exceptions filed in the cause in the circuit court, and to hear the cause on the bill of exceptions, when settled and allowed. The motion is
66 based on the record and an affidavit by defendant's former counsel, C. W. Ashford. We find nothing material to the case in the affidavit. The record shows that libellant's former counsel moved this court, on October 3, 1894, to place this bill of exceptions on the calendar; that the motion was opposed by libellee's said former counsel; and that the court denied the motion. We do not see that the situation has changed materially then, excepting that now a much longer time has elapsed without any attempt having been made on the part of the libellee, or her counsel, to take the necessary steps to have her bill of exceptions allowed and disposed of; and that, too, though this court held (*ante*, p. 117), as long ago as August 15, 1895, that the death of the libellant did not prevent further action from being taken on the exceptions. It is true, that the judge who originally tried the cause has since resigned from the bench,—though this does not appear from the record or affidavit. But he did not resign until over a year after the bill of exceptions was prepared, and no excuse has been shown for the failure to get the bill allowed by him, or, if possible, by his successor, and no refusal to allow the bill has been shown, so as to au-

thorize this court to allow it as provided by section 74, ch. 57, Laws of 1892.

"The motion is denied.

"A. S. Humphreys, for the motion.

"Kinney & Ballou, *contra*."

67 That the opinion and decision rendered in the said divorce action of McGrew *v.* McGrew was as follows, to wit:

"(Title of Court and Cause.)

"*Decision.*

"The point upon which this matter was taken under consideration was, as to the sufficiency of the proof of marriage.

"There is a difference in the evidence required to prove a marriage between civil and criminal cases; the presumption of innocence in criminal cases requires that the marriage, like other facts, should be fully proved, there being no presumption in favor of marriage; while in civil cases, such a presumption exists where the parties have lived in the marriage state.

"It was contended for by the libellee that a proceeding of this kind is criminal in its nature and that the same rules must govern as in a criminal case.

"A libel for divorce, which charges adultery, is in the nature of a criminal action, but the authorities seem to hold that, although it is necessary in order to grant the decree in a case of this kind to find that the respondent has been guilty of a crime, yet the case is so far civil as to only require a preponderance of evidence to prove the facts upon which to found the decree.

"See Smith *v.* Smith, 5 Or. 187;

"Chestnut *v.* Chestnut, 88 Ill. 548.

68 "Granting that there is no presumption in favor of marriage in a proceeding of this kind, and that it must be proved like any other fact, I think that the evidence in this case is adequate.

"The law of France provides that, in order that a marriage may be legal, it must have been solemnized before the civil authority after the publication of bans, and without this, no marriage by the church, is of any validity.

"The testimony of Mrs. Neumann was to the effect that she was present, and saw the 'Catholic ceremony in a church,' and afterwards attended the nuptial mass; that the marriage had to wait an hour for Henri McGrew to return with the papers that he had forgotten, 'those were the papers of the law, the marriage by the mayor or judge;' that she 'saw him hand the papers to the priest.' This was competent evidence, and, to my mind, sufficient to support the allegation or marriage.

"As to the charges of adultery: without discussing the particulars of the testimony, I find the act to be proven in the instance where Mr. Pomeroy was discovered upstairs with Mrs. McGrew in her bed-room by Mary and Sylvana. The presence of a

companion at this time is not sufficient to overcome the presumption of guilt arising under the circumstances detailed by the witnesses. I also find the proof to be sufficient
69 in the two instances at the office of Dr. Miner at the hotel stables; the admitted denials of the correspondents being, in my opinion, outweighed by the testimony of Mary in one case and Sylvana in the other, they being corroborated by the witness Ladd. The other acts, although not fully demonstrating the guilt of the parties, yet are clearly supporting in their nature and make an overwhelming preponderance in favor of the libellant.

"The decree is granted on the ground of adultery.

"Dated Honolulu, Aug. 23rd, 1894.

"(S'g'd) HENRY E. COOPER,
"*2nd Judge Circuit Court, First Circuit.*

"A. S. Hartwell and Carter & Carter, for libellant.
"C. W. Ashford, for libellee."

The plaintiff objected to the introduction of the foregoing decision as well as the foregoing opinion of the supreme court on the motion to place cause on the calendar, upon the ground that the same was incompetent, immaterial, and irrelevant, which objections were each overruled and an exception in each case allowed said plaintiff.

That the foregoing was all of the evidence offered on said
70 trial. The said cause was thereupon argued and submitted to said court, and the said court thereafter made and filed its decision herein in favor of said plaintiff, and against the said defendant, in accordance with the prayer of said complaint, which said decision is hereinbefore set forth; and the defendant now specifies the following particulars wherein the said evidence is and was insufficient to justify said decision:—

I.

The evidence is insufficient to justify that portion of the finding designated 1, in said decision hereinbefore set forth, wherein it is stated that this defendant made, executed, and delivered to Henri Golden McGrew a certain policy of insurance, wherein and whereby this defendant promised and agreed to pay unto the plaintiff, Alphonsine McGrew, the sum of five thousand (5,000) dollars, upon the death of Henri Golden McGrew.

On the contrary, the evidence shows that the said defendant promised and agreed, by said policy, to pay unto the said Alphonsine McGrew, as the wife of Henri Golden McGrew, and not otherwise, the sum of five thousand dollars.

II.

The evidence is insufficient to sustain that portion of the finding designated 4, in said decision hereinbefore set forth, wherein it is stated that this defendant has never paid the said sum of five
71 thousand (5,000) dollars, or any part thereof, due on account of said policy.

On the contrary, the evidence shows that the said defendant has paid the same, and the whole thereof.

III.

The evidence is insufficient to sustain that portion of the finding in said decision hereinbefore contained designated 8, wherein it is stated that this plaintiff, on the 5th day of April, 1894, left the Hawaiian islands with the intention of not returning to said islands, but of coming to the State of California, and making her home in, and permanently residing in, said State, and with said intention has made her home in said State, and has continuously resided in said State with such intention, and on the 23rd and 24th of August, 1894, was actually in, and residing in, said State with the intention of permanently residing and making her home in California.

On the contrary, the evidence shows that said plaintiff did not leave the Hawaiian islands with the intention of not returning thereto, and did not leave the Hawaiian islands on said date, or at any time, for the purpose of permanently residing in the State of California, and on the 23rd and 24th days of August, 1894, was not actually residing in said State with the intention of permanently residing therein.

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IV.

The evidence is insufficient to sustain the finding designated 9, to the effect that, prior to the 5th day of April, 1894, this plaintiff had been excluded by such guardian from the home of said Henri Golden McGrew, and was by him prevented from returning to, and has never since been allowed to return to the same, and was, on the said 5th day of April, 1894, excluded from said home by such guardian.

On the contrary, the evidence shows that this plaintiff was not excluded by the said Charles L. Carter, as such guardian, or otherwise, from the home of said Henri Golden McGrew, and that said Henri Golden McGrew did not have a home at said times, at said islands; and that said plaintiff was not, by said Charles L. Carter, excluded from the said, or any home.

V.

The evidence is insufficient to sustain the finding designated 10, in said decision hereinbefore contained, to the effect, that on the said 5th day of April, 1894, this plaintiff had no home, and has never since had a home, in the Hawaiian islands.

On the contrary, the evidence shows that on the said 5th day of April, 1894, and continuously therefrom down to the 22nd day of October, 1894, the home of this plaintiff was at the Hawaiian islands.

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VI.

The evidence is insufficient to justify that portion of the finding designated 12, of the decision hereinbefore contained, to the effect that the plaintiff, through her attorney, notified adverse counsel in

the said action, in accordance with the rules of the said court, of the filing of the said bill of exceptions.

On the contrary, there is no evidence to show that said adverse counsel were notified of the filing of said bill of exceptions.

The said decision is against law in this:—

I.

That the findings of fact therein set forth do not determine all of the issues raised by the pleadings herein, in this:—

(*a.*) The court has not found, upon the allegations contained in the amended answer herein, to the effect that the decree of divorce rendered in the said divorce action of McGrew *v.* McGrew has never been modified or set aside, and is, and was, at the time of the commencement of this action, in full force and effect.

(*b.*) The said findings of fact do not determine the issues raised by the following allegation in said answer:—

"That under and by virtue of the foregoing provision of law and decree of divorce, all rights of the said Alphonsine McGrew
74 in, and to said policy of insurance did pass to the said Henri Golden McGrew, and became his absolute property, free and clear of any claim of the said Alphonsine McGrew, plaintiff herein, whatsoever."

(*c.*) Said findings of fact have not determined the issue raised in said amended answer, to the effect that the said insurance company has been compelled to pay to J. O. Carter, as the administrator of the estate of said Henri Golden McGrew, deceased, the full amount of said policy, and that, by said payment, said defendant discharged all its obligations in said policy to any one whomsoever.

II.

The first conclusion of law in said decision contained is not supported by the findings of fact therein contained.

III.

The second conclusion of law therein contained is not supported by the findings of fact therein contained.

Errors of Law Occurring at the Trial and Excepted to by the said Defendants.

I.

The court erred in sustaining the objection of the plaintiff to the introduction in evidence of the payment by the said insurance company to J. O. Carter, as the administrator of the estate of said
75 Henri Golden McGrew, deceased, of the full amount of money due upon said policy (exception No. 1).

II.

The court erred in overruling the objection of the defendant to the introduction of the rules of practice adopted by the circuit court

of Hawaii, relative to the filing of the bills of exception with the clerk. (Exception No. 4.)

III.

The court erred in overruling the objection to the introduction of that portion of the compiled laws of Hawaii relating to the certification of bills of exception. (Exception No. 5.)

IV.

The court erred in overruling the objection of the defendant to the evidence of the plaintiff as to her intention in leaving the Hawaiian islands. (Exceptions Nos. 6, 7, 8, and 9.)

V.

The court erred in sustaining the objection of the plaintiff to the question asked by the defendant of the plaintiff to the effect that the said Henri G. McGrew was a kind and indulgent husband to said plaintiff, and had always provided her with a home in Honolulu. (Exception No. 10.)

VI.

76 The court erred in sustaining the objection of the plaintiff to the following question asked by the defendant: "Did your husband ask you not to leave him?" (Exception No. 11.)

VII.

The court erred in sustaining the objection to the question: "Had there been any estrangement between the doctor's family and yourself before you left Honolulu on April 5, 1894?" (Exception No. 12.)

VIII.

The court erred in sustaining the objection of the plaintiff to the question: "What made you think that you could get a home here in San Francisco." (Exception No. 13.)

IX.

The court erred in refusing to strike out the answer of the plaintiff, as follows:

"Mr. Carter came out in the paper that nothing was to be delivered to me." (Exception No. 14.)

X.

The court erred in overruling the objection of the defendant to the introduction of the bill of exceptions in the said divorce proceedings. (Exception No. 2.)

XI.

77 The court erred in overruling the objection to the introduction in evidence of the motion of A. S. Humphreys and the affidavit of Clarence W. Ashford. (Exception No. 3.)

XII.

The court erred in making and filing its decision in favor of plaintiff and against defendant herein.

And now, in order that the same may be made a matter of record, the defendant proposes the foregoing as its bill of exceptions and prays for its settlement and allowance as so presented as aforesaid.

Dated October 30, 1897.

CHICKERING, THOMAS & GREGORY,
Attorneys for Defendant.

I agree to the foregoing bill of exceptions.

PLATT & BAYNE,
Attorneys for Plaintiff.

I hereby certify that the foregoing bill of exceptions has been presented to me, the judge who tried said case, in due time, and the same is hereby settled and allowed as a bill of exceptions in said case, and certified to be correct.

GEORGE H. BAHRS, *Judge.*

Dated Nov. 1, 1897.

(Endorsed:) Filed Nov. 1, 1897. C. F. Curry, clerk. By T. C. Maher, deputy clerk.

78 (Title of Court and Cause.)

Notice of Appeal.

To the plaintiff and Messrs Platt & Bayne, her attorneys:

You, and each of you, will please take notice that the defendant in the above-entitled action, hereby appeals to the supreme court of the State of California, from the judgment therein made and entered in said superior court on the 11th day of October, 1897, in favor of plaintiff in said action, and against the said defendant, and from the whole thereof.

CHICKERING, THOMAS & GREGORY,
Attorneys for said Defendant.

Dated Nov. 2, 1897.

(Endorsed:) Due service by copy of the within notice of appeal is hereby admitted this 2nd day of November, 1897. Platt & Bayne, attorneys for plaintiff. Filed November 3, 1897. C. F. Curry, clerk. By T. C. Maher, deputy clerk.

79 (Title of Court and Cause.)

Stipulation.

It is hereby stipulated that the foregoing is a full, true, and correct transcript on appeal from the judgment in the above-entitled action.

And it is further stipulated that a written stipulation has been filed in the above-entitled cause, waiving an undertaking to stay

execution on the judgment herein, and that a good and sufficient undertaking on appeal for costs, in due form of law was, on the 3rd day of November, 1897, filed in said action.

Dated this 9th day of November, A. D. 1897.

W. E. B.

CHICKERING, THOMAS & GREGORY,
Attorneys for Appellant.

PLATT & BAYNE, *Attorneys for Respondent.*

(Title of Court and Cause.)

Clerk's Certificate of Transcript.

I, C. F. Curry, county clerk of the city and county of San Francisco, State of California, and *ex officio* clerk of the superior court in and for the city and county of San Francisco, do hereby certify that I have compared the foregoing transcript on appeal with the original papers in the above-entitled action now on file in my office, and with the orders therein made and entered in the min-
80 utes of said court, and that the said transcript is a full, true, and correct copy thereof.

I certify that a stipulation waiving an undertaking to stay execution has been duly filed, and do further certify, that a good and sufficient undertaking on appeal for costs, in due form of law, was, on the 3rd day of November, A. D. 1897, duly and properly filed in said action.

In witness whereof, I have hereunto set my hand and affixed the seal of the said superior court this — day of November, A. D. 1897.

[SEAL.]

—— ——, *Clerk*,
By —— ——,
Deputy Clerk.

80½ Received a copy of the within transcript this 9th day of November, A. D. 1897. PLATT & BAYNE,
Attorneys for Respondent.

W. E. B.

81 San Francisco, No. 1230.

In the Supreme Court of the State of California.

ALPHONSINE MCGREW, Respondent,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Appellant.

Appellant's Brief.

Chickering, Thomas & Gregory, attorneys for appellant.

Filed this Feb. 2, 1898 *day of February, A. D. 1898.*

T. H. WARD, *Clerk*,
By A. W. JOHNSON,
Deputy Clerk.

W. E. B.

81½ In the Supreme Court of the State of California.

ALPHONSINE McGREW, Respondent,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Appellant.

Appellant's Brief.

Henri G. McGrew, a member of a prominent Hawaiian family, had lived practically all his life in the Hawaiian islands. In 1890, while a student of medicine in Paris, he met and married the plaintiff, and soon thereafter returned with her to Honolulu, where he engaged in the practice of his profession.

In 1892 he filed an application with the defendant's local agent at Honolulu for a policy of insurance upon his life, and in
82 response the policy in suit was issued to him. By its terms it was made payable to "Alphonsine McGrew, my wife."

In the early part of the year 1894, Henri McGrew, whose mind had been failing for some time previous thereto, was judicially declared incompetent by a court of the Hawaiian islands having jurisdiction of such matters, and Charles L. Carter was appointed the guardian of his person and estate.

Upon February 8, 1894, an action was begun by Mr. Carter, as the guardian of Henri McGrew, against the plaintiff herein, for a divorce upon the ground of her adultery, and process was, on the same day, served upon her at Honolulu. She thereupon appeared in the action and filed an application, verified by herself, for attorneys' fees and alimony *pendente lite*, therein stating that she was desirous of contesting the suit, and required assistance to do so.

Upon April 11th she demurred to the libel, upon the ground that the guardian of an insane person had no authority to maintain a suit for divorce in behalf of his ward. The trial court reserved this question for the consideration of the supreme court, and accordingly an opinion was therein rendered July 31st, holding that the demurrer was not well taken. (McGrew *v.* McGrew, 9 Hawaiian Reports, 475.) (These opinions have been made a part of the record, fol. 119.)

Thereupon an answer was filed by Mrs. McGrew, denying all the allegations of the complaint, and upon the issues thus joined,
83 a trial was had. At this trial evidence was introduced by both parties, and, after argument by counsel, a decision was rendered on August 23, 1894, granting the prayer of the libel, which judgment was entered on the next day. From this judgment no appeal was taken, but a draft of a bill of exceptions was prepared and delivered by the attorney of Mrs. McGrew to the clerk of the court for the certificate of the trial judge, who was temporarily without the islands. It was not, however, certified by the judge on his return, and has never been certified, as required by the practice of that court.

Upon the 22d of October, 1894, Henri McGrew died at Honolulu,

and Charles L. Carter was appointed administrator of his estate. Shortly thereafter, as such administrator, he commenced an action against the defendant company to recover the proceeds of the policy of life insurance. This action was founded upon the fact that there was, upon the books of Hawaii, a law providing that, whenever a divorce was decreed for the adultery of the wife, the husband should hold her personal estate forever. It was claimed that, by virtue of this statute, the beneficial interest of Mrs. McGrew in the policy had passed to Henri McGrew upon the rendition of the divorce decree, and that, upon the latter's death, it descended to his personal representative.

The company answered, contesting this assignment, but after trial had, a judgment was given the plaintiff for the full amount of the policy. From this judgment an appeal was prosecuted to
84 the supreme court, and after elaborate arguments, a decision was there rendered affirming the judgment.

Carter *v.* Mutual Life, 10 Hawaiian R. 117.

By this decision the following facts were determined:

1. That Alphonsine McGrew was not a necessary party to the action of Carter *v.* Insurance Company.

2. That Henri McGrew and Alphonsine McGrew were divorced by the decree of August 24, 1894, and that decree had become final, notwithstanding the alleged bill of exceptions.

3. That the provisions of the statute above mentioned were applicable to the interest of Alphonsine McGrew in the life insurance policy, and that, therefore, this interest passed to the administrator of the estate of Henri.

Thereupon the company filed a petition for rehearing, upon which exhaustive oral argument was again had, and a second opinion rendered (10 H. R. 559), reaffirming the principles of the first opinion and, deciding, in addition:

1. That the statute was constitutional.

2. That the property rights in the policy were a necessary incident to the divorce decree, and passed by operation of law.

3. That the removal of Alphonsine from Hawaii, before the rendition of the decree, did not take away its operative effect upon her personal estate.

85 The rehearing being thus denied, the company was compelled to pay the amount of the policy, with interest and costs, to the administrator, and received from him the policy cancelled, and receipt in full.

On April 5, 1894, a little less than two months after the commencement of the divorce action, Alphonsine McGrew left Honolulu and came to San Francisco, where she has since resided. It is found by the trial court that she came here without the intention of returning to Honolulu, and that she has, ever since her arrival here, been domiciled in the State of California.

It will thus be seen that the only question now involved in the present action is the validity of the previous transfer by operation of the Hawaiian law. If this court takes the same view of this

transfer as did the Hawaiian court, the judgment must be reversed; if not, the company must pay the same policy twice.

First point.

The divorce decree in McGrew *v.* McGrew is conclusive upon this court, because a divorce, good where obtained, is good everywhere.

(1.) It is a fundamental proposition that all divorce jurisdiction depends upon the domicile of the parties. When a tribunal of that domicile has required jurisdiction of the parties, and has thereafter granted a divorce, it is valid everywhere. This is grounded
86 upon the eminently just proposition that each country has the right to regulate the status of the persons who have made it their home. If matrimonial differences arise, they must be referred to such a tribunal. So far, at least, as it affects the status of the parties, such a proceeding is *in rem*, and binding upon all the world.

In re Newman, 75 Cal. 213;
In re James, 99 Cal. 374;
Burlen *v.* Shannon, 3 Gray, 387;
Cheely *v.* Clayton, 110 U. S. 701.
Black on Judgments, sec. 822.

Being a proceeding *in rem*, a foreign decree of divorce is as controlling upon our courts as a domestic decree.

Sec. 1915, sub. 1, C. C. P.;
Hilton *v.* Guyot, 159 U. S., p. 167.

The facts heretofore stated, and the findings of the trial court, show that both parties to the action of McGrew *v.* McGrew were domiciled in Hawaii at the time of the commencement of that action. That the defendant was not only served with process there, but also appeared and contested every phase of the litigation, thus submitting herself fully to the jurisdiction of the courts of that country. It is, therefore, immaterial whether the Hawaiian court violated a "uniform current of authority," as is claimed by the respondent, in allowing a guardian of an insane person to bring an action for a divorce, because this question having been
87 directly brought in issue in the Hawaiian suit, and decided adversely to the contention of respondent, she is now concluded by it.

It is not true, however, were we to consider this question in the first instance, that the decision in McGrew *v.* McGrew is opposed by authority. That decision is expressly based upon the construction of an Hawaiian statute. The court, after a full examination of the adjudicated cases, said (9 H. R. 478):

"On authority we should be obliged to hold that, in the absence of statute, this suit could not be maintained, and the sole question is whether our statutes go to the extent of allowing such a suit."

This question they answer in the affirmative.

That such a right of action can be established by statute has never been questioned, and, under these statutes, actions for divorce

by guardian, have been frequently maintained in England and the United States.

2 Bishop M. & D. 306;
Thayer *v. Id.*, 9 R. I. 377;
Garnett *v. Id.*, 114 Mass. 379;
Cowan *v. Id.*, 139 Mass. 377;
Baker *v. Id.*, L. R. 9 P. D. 142.

The statute upon which this decision was based has not been introduced in evidence, and since it must be assumed that the Hawaiian court correctly construed its local statute, and that
88 this statute authorizes such a proceeding, this decision is clearly not opposed to, but in harmony with, the authorities of this country and England.

(2.) The decree of divorce became final prior to the commencement of this action.

One of the allegations in the answer (fol. 38) is "that, on the 23d day of August, 1894, a decision was rendered by the circuit court, dissolving the bonds of matrimony theretofore existing between said parties, upon the ground of the adultery of the said Alphonsine McGrew, which said decree of divorce has never been modified or set aside, and ever since has been, and now is, in full force and effect."

The trial court has made no finding upon the finality of this decree, simply stating (fol. 53) that a divorce decree was signed. This has been especially assigned as error (fol. 219), upon the ground that the court has not found upon all the issues of fact presented by the pleadings. If this be, however, a conclusion of law, as claimed by the respondent, which may now be determined by this court, irrespective of any finding by the trial court, then we submit these considerations.

It is claimed by respondent that the divorce decree did not become final, because the alleged bill of exceptions was not disposed of before the death of Henri; that after his death, no further steps could be taken, even in reference to property rights, and therefore Alphonsine was the wife of Henri at the time of his death.
89 This contention is based upon an Hawaiian statute (fol. 160), reading as follows:

"Any party aggrieved by any order or decision of the circuit court may except thereto, and his exceptions shall be duly noted and certified to the supreme court, and no order or decree for a divorce shall be made absolute until such exceptions shall be disposed of. Said exceptions shall be argued and determined in the supreme court sitting *in banco*, and if the court *in banco* shall be of opinion that the order or decision excepted to in said circuit court was erroneous, they shall so certify, and thereupon the case shall be heard anew."

The admissibility in evidence of this statute will be considered further. The question here presented relates to a matter of local procedure and practice. It is simply whether a proposed bill of exceptions must be certified, under the Hawaiian law, before it can

be operative in preventing a decree of divorce from becoming absolute.

In the case of Carter *v.* Mutual Life, 10 H. R. 117, this question was considered at length by the Hawaiian court, and the following conclusion reached:

"The practice here in divorce, as in other law cases, has usually been to enter at once, in the circuit court, an absolute decree or judgment, which is subject to be set aside by the supreme court on exceptions. This is what is meant by the provisions of the statute that 'no order or decree for a divorce shall be made absolute
90 until such exceptions shall have been disposed of.' An absolute decree is made at once, but, if excepted to, it may be set aside by the supreme court. If not excepted to it is, and remains, absolute. This has been the construction placed upon the statute in practice, and it is in harmony with the more general provisions and the practice thereunder relating to exceptions in all law cases. (Laws of 1892, chap. 57, secs. 72–78.) The 'exceptions' referred to in the statute are 'exceptions allowed or certified by the supreme court.' If they are merely exceptions alleged to have been made by counsel, whether allowed or certified or not by the court, and if no absolute decree could be made until such exceptions are argued and determined in the supreme court, it would be in the power of the party, against whom the decree of divorce has been made, to forever prevent the decree from becoming absolute by merely filing alleged exceptions, perhaps wholly 'uncomfortable to truth,' and never following them up, or attempting to have them allowed or certified, but, on the contrary, resisting all endeavors on the part of the opposite party to have them disposed of. In this case it appears that no exceptions have ever been allowed or certified to the supreme court, and from all the circumstances, it would seem that the libellee had abandoned her intention, if she had any, of getting her exceptions allowed, if she could, and having them argued and determined in the supreme court."

The decision of the Hawaiian court upon this question of practice is conclusive upon this court.

In Elmendorf *v.* Taylor, 10 Wheaton, 152, Chief Justice Marshall said:—

"No court in the universe which professes to be governed by principle would, we presume, undertake to say that the courts of Great Britain or France, or of any other nation, had misun-
91 derstood their own statutes, and, therefore, erect itself into a tribunal which should correct such misunderstanding. We receive the construction given by the courts of the nation as the true sense of the law, and feel ourselves no more at liberty to depart from that construction than to depart from the words of the statute."

For this court to hold that the Hawaiian court had made a mistake in construing its own rule of practice would lead to an absurdity, for questions of practice and procedure are, in a large measure, derived from the decisions of the courts themselves, and from the rules which the courts adopt for their own administration.

To say that the Hawaiian court made a mistake in this construction, would necessitate the production before this court of all the facts and circumstances surrounding the case at Honolulu. At the very outset it appears that their construction is based upon analogy with the practice relating to exceptions in law cases, and those other statutes are specifically referred to. These statutes have not been introduced in evidence, and this court cannot now say what they contain, much less what the "uniform practice" in this regard has been there.

There is another ground upon which Alphonsine McGrew cannot now be heard to say that this decree did not become final. Her actions since that time show that she has abandoned any right of having her case passed upon by the appellate tribunal. They
92 show that she cannot make this contention in good faith. A brief reference to dates will show this.

The alleged bill of exceptions was filed with the clerk of the court October 1, 1894, but no effort has ever been made by the defendant to have them certified, or to compel the clerk so to do. If there is no fixed time within which a bill of exceptions must be presented to the appellate tribunal, it must be within a reasonable time. This right, like every other legal right, may be lost by laches, and a delay of nearly three years in presenting the bill of exceptions for certification, without explanation, warrants this court in assuming that the appeal was long since abandoned.

In contrast to this reluctance of the defendant in the divorce suit to have the supreme court decide the matter, is the activity of the plaintiff, or libellant. On October 2, 1894, the latter appeared before the supreme court and prayed that the bill be heard without a settlement. At the hearing of this motion Mr. Ashford, counsel for Mrs McGrew, appeared and opposed it. The court declined to act because the bill had not been signed by the trial judge. Nevertheless, although the mode of procedure was then pointed out by the supreme court, and notwithstanding the subsequent decision of Carter *v.* Mutual Life, on August 15, 1895, that the divorce decree was final, and that the same could have been passed upon by the appellate court, notwithstanding the death of Henri, neither Alphonsine nor her counsel made any effort whatever to press the matter
93 until January 19, 1897, when precisely the same motion that had been theretofore denied was again made, to wit: a motion before the supreme court to pass upon the matter without the allowance of the bill. Why, during all this period, was not this bill presented to the trial judge for his allowance or rejection? Why, after full knowledge of the rulings of the court, did not counsel adopt the procedure pointed out by that court? The only answer suggested by counsel to those inquiries is that, by the death of Henri McGrew, the action for all its purposes abated. But the Hawaiian court had decided precisely the reverse; this was the law of the case, and no litigant can excuse himself for his neglect to avail himself of a certain course of procedure by simply stating that the procedure is wrong.

But were we to pass for a moment the proposition that, by its de-

cision in Carter *v.* Mutual Life, the Hawaiian court laid down a course of procedure which was conclusive upon all parties who thereafter came before the tribunals of that country, and examine anew the merits of that decision, it would be clear that it is correct. It is, of course, the rule that death abates the action of divorce so far as it applies to the status of the parties, but it is not true so far as the property rights are concerned, which was the precise distinction made by the Hawaiian court. In Thomas *v.* Thomas, 57 Md. 554, it is said :

"So far as the question of the marital relation was con-
94 cerned, that question was forever concluded by the death of the appellee, and no one had any longer any interest in reviving it; but the decree which granted the divorce at the same time determined the property rights of the appellant, and, if unreversed, deprived her of all rights in her late husband's property. With respect to that question, her interest survived, and, if the decree was erroneous she was aggrieved thereby, and had a standing in court to prosecute an appeal therefrom for the purpose of having the decree reversed."

And that a right of appeal may exist in a divorce case, so far as property rights are concerned, notwithstanding the death of one of the parties, is directly decided by the following authorities:

Wren *v.* Moss, 7 Ill. (2 Gill), 72;
Downer *v.* Howard, 44 Wis. 82;
Shafer *v.* *Id.*, 30 Mich. 162;

Nor can plaintiff excuse her negligence by the fact that the proposed bill of exceptions was delivered to the clerk. All the circumstances surrounding the case and the argument of counsel herein, show that the clerk did not present the bill, because Mrs. McGrew's attorney asked him not to do so, thinking that the death of Henri rendered further proceedings useless. This is clearly shown by Mr. Ashford's affidavit (fol. 153), wherein he states that he took no further step in the matter, believing that the suit was terminated by the death. In this belief he was mistaken, and the consequence of his mistake must fall upon his client, and not upon the other party to the suit.
95 That no reliance was placed upon the filing with the clerk is further shown by the subsequent motion made in the supreme court (fol. 144); there the attorney for Alphonsine prayed the appellate court to settle the bill. He had taken it from the clerk, but still presented it to the wrong tribunal. That he did not present it to the trial judge, even at that late date, shows that the defendant in that case did not desire a hearing in the supreme court. Upon this branch of the case we submit:—

(1.) The divorce decree is conclusive upon this court, because a divorce good where obtained is good everywhere.

(2.) The divorce decree was final when entered, because the Hawaiian court have so decided.

(3.) The divorce decree became final before this action was begun, by reason of the laches of Alphonsine McGrew.

Second point.

The Hawaiian statute is mandatory and self-executing, and upon the rendition of the divorce decree, the interest of Alphonsine McGrew in the insurance policy passed by operation of law.

It will be observed that this statute (fol. 117) does not contemplate nor require that the personal estate of the wife shall be named in the decree; on the contrary, it provides that, in all cases, the personal estate of the wife passes to the husband when a
96 divorce is decreed on account of her adultery. In this respect little aid may be obtained from the decisions of California, because our statutes (secs. 146–147 of the Civil Code) provide that the "court shall assign property, etc.," thus clearly showing that title passes only when the court has made a finding to that effect. In other words, our statutes are not self-executing; but it is equally plain that the Hawaiian statute did not contemplate the necessity of an intervening decree of court which should directly pass upon property rights. That court could have no power to grant a divorce upon this special ground, and say that the wife's personal property should not pass from her, any more than our court could declare a person insolvent, and say that the title of his property did not pass from him. Since any action the court might take in reference to the personal estate of the wife would be nugatory, it was neither necessary nor proper that any mention of those rights appear in the pleadings or the decree.

In other States, statutes similar to this have been construed. A precise analogy may be found in section 495 of the Code of Oregon, which, prior to 1865, declared:—

"Whenever a marriage shall be declared void or dissolved, the party at whose prayer such decree shall be made, shall, in all cases, be entitled to the one-third interest in his or her individual right in fee of the whole of the real estate owned by the other at the time of such decree, in addition to the further decree for maintenance provided for in sec. 497."

97 In 1865 the following sentence was added to the section:

"And it shall be the duty of the court in all such cases to enter a decree in accordance with this provision."

In construing this statute Judge Deady, in Barrett *v.* Failing, 6 Saw. 473, (affirmed 111 U. S. 523), said:

"As it originally stood in the code, this section simply provided that, upon the dissolution of a marriage, the real property of the parties should be discharged from any claim or interest of the other therein; providing, if the marriage was dissolved on account of the adultery or conviction of a felony of either party, then the innocent party should be entitled, as tenant in dower, or by the courtesy, as the case might be, in the real property of the other, the same as if that other were dead. *The statute declared this to be the legal effect and operation of the decree, and it was neither necessary nor proper that the pleadings or decree should allege or contain anything on the subject.*"

In Bamford *v. Id.* 4 Or. 30, the supreme court, in construing the

same statute, held that by the amendment it was evidently the intention of the legislature that the court should include in its decree a reference to property rights, saying;

"If it was the design that granting a decree of divorce should, in every case, have the effect to transfer one-third of the real estate of the party at fault, without specifying particular parcels, there would be no necessity for requiring the court to enter anything in the decree on that subjec. *The desired result would be produced by the law, and not by the formal words entered in the decree.* If that is the construction, the last provision may be stricken out without altering the effect of the statute." The italics are ours.

98 The rights of husband and wife in the property of each other upon divorce, depend entirely upon statute. Indeed, all divorce jurisdiction depends upon statute.

Works on Jurisdiction, sec. 73;
Hopkins *v. Id.*, 39 Wis. 167;
Le Baron *v. Id.*, 35 Vt. 364.

If a statute provides that the innocent party is entitled to certain property rights by operation of law, a decree of such court is as binding upon those property rights as it is upon the status of the parties. The proceeding, then, is for something more than a dissolution of the marriage tie, and is akin (in relation to property rights) to marriage at the common law, where, without any agreement to that effect, but, by operation of law, property rights pass from the wife to the husband.

In many States it is provided that, upon a divorce for the adultery of the wife, the husband holds her personal estate absolutely. Such is the law in Maine, Vermont, Rhode Island, Michigan, Nebraska, and Arizona.

Stimpson Amer. Stat. Law, sec. 6249.

In many other States it is provided that a wife, divorced on account of the adultery of her husband, is entitled to her dower right the same as if he were dead.

Bishop on M. & D., sec. 709;
Davol *v.* Howland, 14 Mass. 219;
Harding *v.* Alden, 9 Me. 140;
4 Kent Com. 54.

99 The one-third interest passes to the wife upon the rendition of the divorce. It has been held that the court has no power to assign it in the decree, but the wife must procure her rights by an independent action.

Smith *v.* Smith, 13 Mass. 231.

Mr. Bishop, in his recent work on Marriage, Divorce, and Separation, speaking on this question says, section 1521:

"Both in natural propriety and juridical reason, the sentence should be an embodiment in direct words of the determination of he court upon the combined pleadings and the admitted proven acts when all have been duly produced by the parties, passed upon

by the jury, if necessary, and considered by the judge. What will flow from the sentence as of law ought not to be inserted in it, for the court has no control over such a matter, and an attempted determination thereof would be simply an extrajurisdictional impertinence."

And, again, section 1522, he says:

"Some of our statutes give the wife dower on a dissolution of the marriage for the husband's fault, not on the fault itself, but on the divorce. Plainly, therefore, it would be vain and extrajurisdictional for the decree to declare her right to dower, and contrary to law to deny it."

The foregoing are cited merely as instances of legislation by which property rights pass to the innocent party in a divorce suit, although no mention of these rights has been made either in the pleadings or decree. They show that a decree of divorce may not only fix the status of the parties, but also may, by virtue of
100 that status, cause certain property rights to be divested.

There is nothing anomalous in such a judgment, as the following familiar examples will show: An adjudication of insolvency passes property from the insolvent by operation of law, without any order to that effect. Rued *v.* Cooper, 109 Cal. 683. Marriage, an adjudication of heirship, a conviction for certain criminal offenses, are all cases where there may be an alienation of title to property, resulting as a necessary incident from the adjudication of a personal status.

We claim that the Hawaiian statute is in line with these examples; that the proceedings were not only for the purpose of obtaining a divorce and thus determining the status of the parties, but also, and as a necessary incident, to fix the personal property rights of Alphonsine McGrew. That it is precisely analogous to the effect of a divorce decree upon a dower right. Such being the nature of the proceedings, the respondent here is bound by that judgment, for the force of a judgment extends to everything which must necessarily be determined by it.

As stated by Story on Conflict of Law, sec. 230*b*:

"Incidents of a foreign divorce are also fairly to be deduced from the law of the place where it is decreed. If valid there, the divorce will have, and it ought in general to have, all the effect in every other country upon personal property locally situated there, which are properly attributable to it in the forum where it is decreed."
101 This was the view adopted by the Hawaiian court in their opinion rendered upon the petition for rehearing in Carter *v.* Mutual Life, where they said:

"The court having acquired jurisdiction under these circumstances, the incident of the divorce would follow according to the law of the place of the divorce."

Since the present action is not between the same parties as the divorce action, the judgment in the latter case cannot be technically pleaded as *res judicata* so far as property rights are concerned; but it is manifest that the result must be the same; that is, if in any subsequent suit between Mr. and Mrs. McGrew this judgment would

have been a bar as to all matters within its scope, then it must have operated as a valid transfer of which this defendant, although a stranger to the former record, may avail itself.

Assume, therefore, that Henri McGrew were still living: that Alphonsine had removed to California, bringing with her the policy, and that Henri had brought action in replevin in the courts of this State to recover the policy. Henri could then produce a judgment between the same parties, rendered in a court of competent jurisdiction, wherein the property rights in the policy had necessarily been adjudicated. The California court would then have before it simply the question of the effect to be given to the foreign decree. So
for as it affected the status of the parties, it is a decree *in rem*
102 and conclusive; so far as it affected property rights, it would
be a decree *in personam*, and by the comity of nations, binding upon both parties to the action in this forum.

That such result must have followed in a subsequent suit between the two parties is a necessary consequence of the recent decision of the U. S. Supreme Court in Hilton *v.* Guyot, where the subject of the binding effect of a decree of a foreign court is exhaustively discussed. They say, 159 U. S. 202:

"In view of all the authorities upon the subject and of the trend of judicial opinion in this country and England, following the lead of Kent and Story, we are satisfied that, where there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not in an action brought in this country upon the judgment, be tried afresh as on a new trial, or an appeal, upon the mere assertion of the party that the judgment was erroneous in law or fact. The defendants, therefore, cannot be permitted, upon that general ground, to contest the validity, or the effect of the judgment sued on."

The system of jurisprudence in Hawaii is founded upon the common law of England, which is also the groundwork of the
103 laws of California (Pol. Code, 4468). It would appear that
Alphonsine McGrew was given a fair and full trial abroad, before a court of competent jurisdiction, and, therefore, in such a suit she could not be heard in her assertion that the foreign judgment was erroneous in law or in fact.

The principle thus laid down in Hilton *v.* Guyot, is especially applicable to an Hawaiian judgment, on account of the treaty obligations between the United States and that country. By article VIII of the treaty, proclaimed November 9, 1850 (Treaties and Conventions of the United States, page 540), of which this court will take judicial cognizance (sec. 1875, C. C. P.), it was provided that the rights

to the personal property of a citizen of either country should be "decided finally by the laws and judges in the land wherein the said goods are."

At the time the divorce litigation was commenced, Mrs. McGrew was an Hawaiian subject. Under no possibility could she have been a subject of the United States, because her former home had been in Paris, France; but, even assuming that by her change of residence to California she became a subject of the United States, and was such at the time of the rendition of the decree, still the judgment of the court below violates this treaty obligation, in that it has not left the decision, as to the ownership of this insurance policy, to the laws and judges of Hawaii. Whatever rights were acquired in the policy were acquired in Hawaii. The application for the
104 policy was made there, and there it was delivered (folios 47–49). The policy always remained there, until delivered to the defendant. So far, then, as any chose in action may be said to have a locus, this had one in Hawaii.

Third point.

The change of residence of Alphonsine McGrew did not deprive the Hawaiian court of its jurisdiction, or divest the Hawaiian law of its operative effect upon the title to her property.

The judgment of the trial court was based solely upon the ground that Alphonsine McGrew had become domiciled in California before the rendition of the divorce decree; that the Hawaiian law had no extraterritorial effect, and, therefore, did not divest her of her property rights, because she had removed them from without its operation. It is respectfully submitted that this view does not take cognizance of the principal fact in the case, viz. that Mrs. McGrew had, before her departure, appeared in the divorce proceedings, and the Hawaiian court had obtained jurisdiction over her.

The citations, heretofore given, show that it was neither proper nor necessary to make any mention of property rights in the pleadings. Mrs. McGrew is presumed to know the law, and with this knowledge, must have known that the effect of a decree in
105 the divorce proceeding would be to divest her of her personal estate. Let it be particularly noted that the rights of no third party are concerned here. She did not sell or assign her interest to an innocent purchaser, who had no knowledge of the divorce proceedings; on the contrary, it is she who now claims the ownership of this policy, notwithstanding the fact that she withdrew from the Hawaiian islands knowing that her personal estate was in process of litigation. She was the owner both at the commencement of the action and when the decree was rendered.

The jurisdiction having once attached, it could not be ousted by a change of residence of one of the parties. Thus in 12 Ency. of Law, 305, it is said (in the foot-note):—

"The jurisdiction of a court depends upon the state of things at the time the action is brought. Once vested, it is not ousted by

subsequent events. Thus no change in the residence of parties can take away jurisdiction that has once attached."

The Hawaiian court, in its opinion on petition for rehearing, said:—

"Both parties were undoubtedly domiciled here when the divorce proceedings were commenced and when the court acquired jurisdiction over them, and that was sufficient so far as the question of domicile was concerned."

To the same effect is:—

Tapley *v.* Martin, 116 Mass. 275;
Lowry *v.* Hall, 37 Amer. Dec. 495;
Harrison *v.* Id., 20 Ala. 269.

106 We claim, therefore, that the removal of Alphonsine McGrew to California is a false quantity in this case. It could have no possible effect upon the results of the litigation already commenced. If her personal estate was not involved in that litigation, then, if she had remained in Hawaii, that estate would not have been affected by the decree; but, on the contrary, if her personal estate was involved in that litigation, the fact that she withdrew unto another jurisdiction could not oust it. That jurisdiction having attached, she could not take an unqualified interest in her personal estate to any place however remote; it would always be subject to divestment under the proceedings already begun.

This may be made apparent by simple analogy. Assume that creditors file a petition in a superior court of this State praying that their debtor be declared insolvent. The order to show cause is served upon him here. Before the adjudication of insolvency, he removes to Nevada, taking with him a piano. Assume that by the law of California this property is not exempt from execution, and therefore passes to the assignee, but that, by the law of Nevada, it is exempt. Could the insolvent claim that by this change of domicile the superior court was ousted of its jurisdiction to divest the insolvent of this property by the adjudication of insolvency? We think clearly not, for such a rule would permit any one to defeat the effects of a judicial proceeding by simply removing to another jurisdiction.

107 The case at bar presents many features which emphasize our position in this regard.

The respondent remained in Honolulu nearly two months after process was served upon her. She appeared by an attorney, made application for counsel fees, and stated that she desired to contest the suit. Her attorney remained in Honolulu representing her throughout the many stages of a protracted litigation. Had she been successful, the judgment would have been *res judicata* upon the merits of the case, including the title to this insurance policy, (Bishop M. D. & S. 1595.) Henri McGrew could never thereafter have brought a subsequent suit for the same acts of infidelity alleged in that suit and secured a divorce or the title to her property; thus the judgment would have benefited her. She should not be allowed to pursue litigation there to the end, and, after defeat, claim that she had

not submitted all questions involved, to the jurisdiction of that court and the operation of its laws.

Fourth point.

When the Hawaiian decree of divorce became final, property rights in the personal estate of Alphonsine McGrew vested in Henri McGrew. Having thus vested, they were valid the world over.

The trial court has admitted in evidence the Hawaiian statute, against the objections of the respondent. It will, however,
108 doubtless be urged by the learned counsel that this is a penal statute, and therefore it can have no extraterritorial effect. This point is intimately connected with our last point. If we are correct in asserting that the removal of Alphonsine could have no possible effect upon pending litigation, then we may consider that she was—constructively at least—in Hawaiian islands during the progress of that suit. If the Hawaiian statute ever went into effect, it did so there. It became executed there. It can in no sense be executory now. Since the statute and the judgment are inseparable, and the effect of the one follows necessarily from the other, Henri McGrew became vested, if at all, with the personal estate of his former wife in Honolulu.

A legal title duly acquired in any one country, is a good title all over the world.

Sutherland Stat. Con. sec. 13.

And when parties have acquired property right in one jurisdiction and thereafter move into another, their rights must be determined by the laws of the former. The proposition, therefore, that the courts of one country will refuse to execute the penal laws of another country, can have no possible bearing upon this case, because, if the divorce decree had any effect whatever upon this insurance policy, it had that effect in Hawaii.

The difference between the admissibility of a foreign statute for the purpose of enforcing it, and for the purpose of showing property rights already vested in that foreign country, is clear
109 and fundamental. An excellent example is given in the case of Beard's Ex. *v.* Basye, 7 B. Monroe (Ky.) 133.

This was an action in detinue for certain slaves, which had been the property of Mary McDonald while she was a resident of Louisiana and before her marriage. In 1825 she married McDonald, who then persuaded her to remove to Kentucky. By the laws of Louisiana these slaves were the separate property of Mrs. McDonald, but, by the laws of Kentucky, they became her husband's immediately upon marriage. The husband sold the slaves, and then the wife brought this action in a Kentucky court to recover them. The court said (page 141):—

"We are brought to the very important question, whether by the removal of McDonald and wife to Kentucky the right of the latter to the slaves which, notwithstanding her marriage, continued, by the laws of Louisiana, to be her property, became under the laws of

Kentucky absolutely lost to her and absolutely invested in her husband. * * *" And at page 144, "By what law then is she to be divested of this vested right and ownership and the slaves which were hers vested absolutely in her husband? Surely it will not do to say that, because women married and residing here do not, and cannot, hold personal property, therefore a woman married elsewhere and allowed by the laws there to hold her property shall upon coming here with her husband be deprived all interest to it. The laws of Louisiana cannot, it is true, be brought here to create a right nor regulate the mode of its exercise or assertion, and certainly not to establish a right in contravention of our laws or policy and to the injury of our citizens. But they may be brought here to
110 establish or prove a right existing there while the parties and the subject were wholly within the jurisdiction of that State."

In Forbes *v.* Scannell, 13 Cal. 242, a like question in principle was discussed. There an assignment had been made in China of certain property then on the high seas. The assignment was void by California law, and opposed to the policy of this State. The court admits this, but says:—

"There would be more force in this view if this were an executory agreement to make an assignment in this State of this character, or if this property were within this State at the time of the assignment. But here the contract, such as it was, was executed beyond the jurisdiction. The property was beyond this State, the parties also; the actual possession taken, and the title vested in the foreign jurisdiction. The property came into this State with the full effect, whatever that was, which the contract made abroad impressed upon it. * * * The truth is, we do not consider this question as one of comity at all. It is a pure question of property. By our general laws, we recognize the duty of government to protect property, and that is property which is acquired by contract, lawful and effectual, to pass title in the place where it is made. It might as well be said that, if a man made his money by usury in California and carried it into Pennsylvania, the courts of that State would refuse to recognize his right, because usury is against the policy of Pennsylvania. Or, if won at cards in Mexico, where no laws exist against gaming, it would cease to be his property whenever brought into this State."

Kraemer *v.* Id., 52 Cal. 303, holds that where husband and wife by their joint labor, acquire personal property in another State, and by the laws of that State it is the separate property of
111 the husband, and then bring it to California, it remains the property of the husband, although by the statutes of the latter State it would be common property.

We have other authority upon this subject. The learned counsel for plaintiff, while sitting in the quiet surroundings of his study, and not excited by the fumes of advocacy, has said: "If the husband or wife acquire property in one State and then remove to California or Texas with the same, the laws of the State where it was acquired (such being the State of their domicile) governs as to

the ownership of such property." Platt on Rights of Married Women, sec. 13.

Cooley on Con. Lim., page 440, says:—

"At the common law the husband immediately, on the marriage, succeeds to certain rights in the real and personal estate which the wife then possessed. These rights become vested at once, and any subsequent alterations of the law cannot take them away."

In Cahalan *v.* Monroe, 70 Ala. 271, it appeared that Michael and Catherine Cahalan were married in 1859, in South Carolina, that being their domicile. Catharine was then possessed of the sum of $8,500 in money acquired from a former husband. In 1870 they removed to Alabama, bringing the money with them, and invested it in Alabama property. The wife brought an action to enforce a
trust in the property so purchased, upon the ground that
112 her money bought it. By the law of Alabama this money and property were her separate estate, but, by the law of South Carolina, the husband was entitled to all the personal estate of the wife. It was claimed that the title to the money had vested in the husband by the law of South Carolina, where they were formerly domiciled; that this law controlled its title, and that a change of domicile thereafter did not change it. The court adopted this view, saying:—

"The domicile of both parties being then in South Carolina, the rights of the husband to property there acquired and owned by the wife, are to be ascertained and governed by such common-law principles. (Citing authorities.) By the common law, marriage operated as a gift to the husband of all personal property, including money owned by and in the possession of the wife at the time, and of all choses in action which might afterwards be reduced to possession by the husband during coverture. The husband was also entitled to the wife's earnings as they accrued. It follows that upon marriage the marital rights of the husband attached *eo instante*, and the personal property and money acquired by Mrs. Cahalan, before or during her coverture, and owned by her at or during this period, became absolutely his to the same extent as if he had purchased for value. There is nothing, we think, in the facts of this case which so modifies these principles as to bring it within the influence of Castlemon *v.* Jeffries, 60 Ala. 380. After the property became the husband's, the mere fact of bringing it into this State cannot we think, operate to change its status or ownership. Transportation alone cannot effect the question of title."

In Lichtenberger *v.* Graham, 15 Ind. 288, it appeared that the
plaintiff, while domiciled in Kentucky, acquired a certain
113 mule. By the law of Kentucky, the mule then became the property of the plaintiff's husband. Thereafter the parties became domiciled in Indiana, when the husband sold or traded the mule in exchange for a mare. Then the mare was traded in exchange for certain personal property, which the wife brought this action to recover. It was held that the property had vested by the law of Kentucky, and having once vested there, the removal to

Indiana did not change the right of property in it. The court saying:—

"By the law of Kentucky the mule became the property of the husband when received in part payment for the land sold by the wife. The fact that the husband and wife afterward removed to this State did not divest the ownership of the husband and make the mule the separate property of the wife under the statute of this State."

Passing events in the political world give an excellent example of the proposition that title having once vested cannot be divested by a change in the law. One of the plans suggested by which the annexation of Hawaii may be accomplished is that it become a county of California. Assume that Henri and Alphonsine McGrew still remained in Hawaii, and that annexation took place and Hawaii became a county of California. Immediately the laws of this State become operative there; but rights, which had vested by
114 virtue of the Hawaiian law, would not be divested because the law is changed, and if Henri McGrew had acquired a valid interest in this life-insurance policy the change in the law would not revest it in Alphonsine.

In the Estate of Appel, 66 Cal. 432, similar questions were discussed, the court holding that personal property should be distributed by the superior court of this State, in accordance with the laws of the State of Nevada.

In Harral *v.* Harrall, 39 N. J. Eq. 279, facts singularly similar to those in the case at bar were presented. Personal property in New Jersey was held by a New Jersey court to have previously passed to the plaintiff by a French law. By this French law a half interest in the property passed at once to the wife upon marriage. Evidence of this law was admitted, although directly opposed to the law of the forum. *Vide* also:—

3 Ency. of Law, 514 and cases cited;
Kurner *v.* O'Neill, 20 S. E. Rep. 589;
17 Cent. Law Journal, 377;
Bush *v.* Gayner, 73 Ala. 162;
N. W. Bank *v.* Poynter, 11 Rep. 129 (Eng.).

Upon this branch of the case we submit:—

(1.) The adjudication of property rights was a necessary incident to the divorce proceedings.

(2.) The statute being mandatory, title passed by operation of law, and no mention of property rights in the pleadings or decree was necessary or proper.

115 (3.) The change of residence of Alphonsine McGrew had no effect whatever upon the pending litigation.

(4.) The Hawaiian statute having been reduced to a judgment before the commencement of this action, became a rule of property conferring vested rights which must be respected here.

Fifth point.

The court erred in certain rulings.

First. The evidence relating to the payment of the insurance policy to the administrator of the estate of McGrew should have been admitted. (Fol. 114, exception I.) This evidence was pertinent, for the following reason: From the testimony of Mrs. McGrew it appears that there is surviving Henri McGrew one child. (Fol. 185.) If the divorce decree was not final, as is claimed by the respondent, Mrs. McGrew was one of the heirs of Henri McGrew at his death, she being still his wife. He died intestate, and therefore, by the laws of succession of the State of California, Civil Code, sec. 1386, his estate would go to his child and the respondent in equal shares. The laws of succession of Hawaii not being introduced in evidence, must be presumed to be the same as those of California. The payment, therefore, to the administrator of his estate was admissible as against Mrs. McGrew, because it was a payment to her. If,
116 therefore, she gets the full amount of the policy by this judgment, and one-half of the amount of the policy by the payment in Hawaii, the defendant will be obliged to make a payment twice to the same party. This can be characterized by no other name than judicial robbery. We submit, the evidence was clearly admissible, at least for this purpose.

Second. The court erred in overruling the objection of the defendant to the introduction of the bill of exceptions in the divorce proceedings (fol. 141). (Specification 10, fol. 228.) The ground of the objection was fully stated, viz., that the court of last resort of Hawaii had already passed upon the finality of said judgment, and that its decision in that regard was conclusive upon this court.

Third. The court should have sustained the objection of the defendant to the introduction of the rules of practice adopted by the circuit court of Hawaii relative to the filing of bills of exception with the clerk (fol. 159). These rules of practice were simply the rules of court, and were not embodied in any statute. The supreme court of Hawaii, in Carter *v.* Mutual Life, had said that the judgment became final—notwithstanding the alleged bill of exceptions. This decision cannot be overturned by a rule of court for the same authority that made the rule can set it aside.

Fourth. The court erred in overruling the objections to the evidence of Mrs. McGrew relative to her departure from Honolulu. (Exceptions numbers 6, 7, 8, and 9, fol. 163 to 171). We have
117 already attempted to show that the physical presence of Mrs. McGrew in Hawaii could, by no possibility, have had any effect upon the decree of divorce. If that decree had any application to her personal estate, it would so operate whether she was then domiciled in California or in Honolulu. The opinion of the trial court was based solely upon the fact of this removal. We claim, therefore, that its admission in evidence is, under any possible aspect of the case, reversible error.

The argument thus far made is, of course, quite independent of the legal fiction that the domicile of the husband is the domicile of

his wife. The court below held that section 129 of the Civil Code permitted Mrs. McGrew to acquire a separate domicile from her husband after the commencement of the divorce proceedings by him. The section is as follows:

"In actions for divorce the presumption of law that the domicile of the husband is the domicile of the wife does not apply. After separation each may have a separate domicile depending for proof upon actual residence and not upon legal presumptions."

The application of this section to the case of a guilty wife in divorce proceedings, has not, so far as we know, been determined. The general rule is, we believe, that if the wife be first in fault, she cannot acquire a separate domicile.

5 Enc. of Law, 756;
Harrison *v.* Harrison, 20 Ala. 329;
118 Burlen *v.* Shannon, 115 Mass. 431;
Kashaw *v. Id.*, 3 Cal. 312;
Beard *v.* Knox, 5 Cal. 257.

The section of the civil code may not change this rule; it may simply be a declaration of a principle now firmly established, that, for the purpose of bringing an action for divorce, the domicile of the wife may be different from that of the husband, a principle which has been found necessary, on account of the many divers jurisdictions within the United States. If this section is not applicable, then the domicile of Mrs. McGrew, notwithstanding her physical presence in California, continued in Hawaii until some time after the divorce decree.

The finding of the court is that, upon the day of her departure, she had no home in Honolulu. The evidence shows that she had been excluded from the house in which she formerly lived. It does not show that she could not have obtained a home elsewhere in that country. Her motives in leaving Honolulu were, as she stated, two; first, to retain her child; and, second, because she had no home there. The first ground cannot avail her, because the custody of the child was prayed for in the complaint, and she then had no right to deprive that court of its jurisdiction over the child. She surely cannot profit by her own wrong in this respect. Nor is her second motive sufficient, because it does not appear that she made any efforts to obtain money by a petition to the court until June, from
119 which time it was paid her. (Fol. 100–180.) With this allowance she could have secured suitable accommodations. Having thus neglected to make the only demand upon her husband, which was proper under the circumstances, it should not avail her to claim that she had no home in Honolulu, because she did not choose to assert her rights. She should not be allowed to make this neglect a ground for leaving the country pending the progress of the suit.

It is respectfully submitted:

(1.) If this court concludes that the decree of divorce operated to pass title in the insurance policy to Henri McGrew, then the conclusions of the trial court (fol. 62) were erroneous and the judgment

should be reversed, with directions to enter a judgment in favor of the defendant, for since this case is practically heard upon an agreed statement of facts, it is plain that such conclusion must be determinative of the whole matter.

(2.) If this court should be of opinion that the insurance policy did not pass by the divorce decree, nevertheless the judgment should be reversed on account of errors in the admission and exclusion of evidence.

CHICKERING, THOMAS & GREGORY,
Attorneys for Appellant.

119½ Due service of the within is hereby admitted this 1st day of February, A. D. 1898.

PLATT & BAYNE,
Attorney- for Respondent.

W. E. B.

120 San Francisco, No. 1230.

In the Supreme Court of the State of California.

ALPHONSINE MCGREW, Respondent,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Appellant.

Respondent's Points and Authorities.

Platt & Bayne, attorneys for respondent.

Filed this Feb. 14, 1898, *day of February, A. D. 1898.*
T. H. WARD, *Clerk,*
By E. S. BUTTERWORTH,
Deputy Clerk.

W. E. B.

120½ In the Supreme Court of the State of California.

ALPHONSINE MCGREW, Respondent,
vs.
MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Appellant.

Respondent's Points and Authorities.

Statement of the case.

Respondent and Henri G. McGrew were husband and wife on the 14th day of September, 1892. On that date the appellant issued a policy of insurance upon the life of said Henri G. McGrew, payable to "Alphonsine McGrew, wife of Henri G. McGrew," the said respondent.

On the 22nd day of October, in the year 1894, said Henry G. McGrew died. Respondent thereupon brought suit upon this policy in the superior court of the city and county of San Francisco,
121 and recovered a judgment thereon against appellant. From this judgment this appeal is taken.

On the 20th day of December, in the year 1893, respondent and her said husband were residents of Honolulu, Hawaiian islands, and on that date they returned to Honolulu from California, whither they had gone on a visit for the benefit of his health. Upon their arrival in Honolulu, a Mr. Carter met them at the steamer, compelled them to go to a hotel, and refused to allow respondent to go with her husband and their child to their home. She and her husband had then a home in Honolulu, but this Mr. Carter had the key and refused to permit her to enter it, though her clothes were there. Soon thereafter Henri G. McGrew was adjudged an incompetent person, he having softening of the brain, and this Mr. Carter was appointed his guardian. He then caused him to be removed to a hospital, told respondent to go where she liked, refused to give her any money for the support of herself and child, advertised in the newspapers that her husband would not be responsible for her debts, sold all the furniture in her home, and refused to allow her to enter it. She was then entirely without a home or the means of support, and was compelled with her young child to accept the hospitality of a friend.

On the 8th day of February, in the year 1894, the said guardian brought suit for divorce on behalf of his said ward against respondent in the circuit court in Honolulu on the ground of her
122 adultery. Process in that suit was immediately served upon her, and she appeared in said action by her attorney.

On the 5th day of April, 1894, respondent, being without any home and fearing that her child would be taken from her, left Honolulu for California with the intention of making her home in California, did make her home in California, and never returned to Honolulu. (She paid the expenses of this trip out of the proceeds of the sale of a piano, the only property that she had left.)

On the 23rd day of August, in the year 1894, and while respondent was residing in California, a judgment of divorce as prayed for was rendered against her in said action. Respondent's attorney, owing to the absence of the judge of said court, filed his bill of exceptions to this decision with the clerk of said court. Under the rules of said court this was the proper procedure, and it then became the duty of said clerk to present this bill for certification to the judge on his return. This judge did not return until after the death of said Henri G. McGrew, and this bill has never been certified by him.

At the time when this judgment of divorce was rendered, there was in force in the Hawaiian islands a statute which provided as follows:—

"When a divorce is decreed for the adultery or other offence amounting thereto of the wife, the husband shall hold her personal estate forever."

123 Appellant claims that, under this decree of divorce, this policy of insurance vested in the husband, and, therefore, that respondent is not entitled to recover thereon.

Appellant, on pages three to five of its brief, states that, after said judgment of divorce was rendered, an action was begun in Honolulu

by the administrator of the estate of Henri G. McGrew against appellant to recover upon this policy; that judgment was rendered in said action in favor of said administrator and against this appellant; that this judgment was affirmed by the supreme court of the Hawaiian islands, and that this appellant has been compelled to pay, and has paid under said judgment, the money due on said policy. It offered testimony to prove these facts, but this testimony was not admitted by the lower court, upon the ground that respondent was not a party to said action, and was not, therefore, bound by said judgment.

Respondent claims that the only material question involved in this present appeal is the effect of the above-mentioned Hawaiian statute upon her title to this property.

Appellant's counsel has argued at some length upon the finality and effect of this judgment of divorce. We do not consider the finality of this divorce material on this appeal. If the above statute could not operate at the time the divorce was decreed, so as to divest respondent of her title to this policy, it is immaterial whether the divorce became final or not, or whether it must be recognized by the courts of this country or not.

124 *Argument.*

First point.

Conceding, for the purpose of this argument, that the said decree of divorce became valid and final before the commencement of this action, we submit that neither the Hawaiian statute (Trans., fol. 117), nor the Hawaiian decree of divorce (Trans., fol. 109), divested respondent of her ownership of this policy of insurance.

I.

The statute did not accomplish this result because it has no extra-territorial effect, and is one that the courts of this State will not enforce against a person domiciled in California.

First. It is contrary to the policy of California and its laws.

It is universally admitted that a statute of any country is not valid in any other country, except to the extent permitted by the other country under the doctrine of comity, and that this doctrine of comity never obtains when the foreign statute is contrary to the policy of the country in which it is sought to be enforced.

3 Am. & Eng. Ency. of Law, p. 505;
Sutherland on Statutory Construction, p. 12;
Story on Conflict of Laws, sections 22, 23, and 98;
In re Dalpay, 41 Minn. 534;
St. Louis Railway *v.* Brown, 35 S. W. 226;
Whitney *v.* Dodge, 105 Cal. 199.

125 (1.) This statute is contrary to the policy of our laws because it provides for a forfeiture.

It provides that, when a divorce is decreed for the adultery of the wife, her husband shall hold her personal estate forever. This is a

forfeiture, and is so declared by the Hawaiian court, in the opinion rendered upon the rehearing of the case of Carter against the insurance company (Carter *v.* Mutual Life Ins. Co., 10 Hawaiian Reports, —). In that opinion the court said, speaking of this statute: "It may be regarded as a special provision for a penalty or forfeiture in case of a divorce for the offense of adultery."

The policy of our law is to disfavor forfeitures. The Civil Code, section 1442, provides that a condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created. Our supreme court, in People *v.* Perry, 79 Cal. 112, stated that provisions for forfeiture of vested rights, whether in statutes or contracts, are not favored, and are, as they ought to be, construed as strictly, or as liberally as possible, against the forfeiture.

(2.) This statute is contrary to the policy of our laws, because it is an effort to add to the divorce laws of the Hawaiian islands a provision disposing of the wife's separate property when the divorce is upon the ground of her adultery.

Our supreme court, in Reid *v.* Reid, 112 Cal. p. 274, ex-
126 pressly held that the court, in an action for divorce, has no jurisdiction over the separate property of the wife. The policy of our law is to protect the wife in her separate property, under any and all circumstances, making it liable only under her contracts, and never as a penalty or forfeiture for her bad conduct. Our law provides that when a divorce is granted for the offence of the husband, the court may compel him to provide for the support of his wife during her life, or for such period as the court may deem just, having regard to the circumstances of the parties, respectively, and it has provided for the disposition of the community property, in the event of the adultery or extreme cruelty of either party; but it has made no provision as to the disposition of the wife's separate property on a divorce for any cause. There is but one provision of
W. E. B. law wherein the code attempts to take from the wife her separate property, other than under her contracts, and that is found in section 143 of the Civil Code, providing for the support and education of children. This statute, therefore, interferes with the policy of the California law, and is contrary and antagonistic to it, and, therefore, will not be enforced in California.

Second. This court will refuse to enforce this statute, not only because it is contrary in spirit to the policy of the laws of California, but also because it is a penal statute of a foreign country.

A statute which imposes a liability that is neither created
127 by contract nor given as compensation for a direct and immediate wrong, which is imposed upon a person as a consequence of the doing or omission of an act, and which is not measured by any injury flowing from the act or omission, and which is in the nature of a punishment, is a penal statute. The object of such a statute is to inflict a punishment for doing what is prohibited or for failing to do what is commanded.

Kleckner *v.* Turk, 63 N. W. 473 (Nebraska);
Globe Pub. Co. *v.* Bank, 41 Neb. 181;
Diversey *v.* Smith, 103 Ill. 378;
Kimball *v.* Davis, 52 Mo. Appeals, 212.

The proposition is well settled that penal statutes are local, and are not enforced on any principle of comity outside of the jurisdiction enacting them, and this is true whether the remedy afforded is to an individual or to the State.

Kimball *v.* Davis, *supra;*
Cook on Stockholders, section 223;
Derickson *v.* Smith, 27 N. J. Laws, 169, 173, 177;
Blaine *v.* Curtis, 59 Vt. 120;
Russell *v.* Railway, 113 Cal. 261;
Phillips *v.* Madrid, 83 Me. 205;
Ferguson *v.* Sherman, 47 Pac. Rep. 1024–'5, (Cal.);
Dale *v.* Atchinson, 47 Pac. Rep. 523 (Kansas).

W. E. B. In this last case an attempt was made in Kansas to enforce a statute of New Mexico which authorized a
128 recovery from a railroad company of $5,000.00 by certain designated persons whenever a person dies from an injury caused by the negligence of an employee managing any train or locomotive. The court held that the courts of Kansas would not enforce this New Mexico statute because it was not strictly compensatory, but was merely penal, requiring the infliction of a penalty of $5,000.00, neither more nor less, irrespective of the real amount of damage suffered. To the same effect are

Marshall *v.* R. R. Co., 46 Fed. 269;
Philpot *v.* R. R. Co., 85 Mo. 164;
Adams *v.* R. R. Co., 30 At. Rep. 687 (Vt.);
Story on Conflict of Laws, sec. 621.

In Langdon *v.* N. Y. R. R. Co., 11 N. Y. Supp. 514, an effort was made to enforce in New York a statute of Pennsylvania inflicting treble damages upon common carriers for any undue or unjust discriminations. The court held that the statute could not be enforced in New York if it was penal in its nature, under the rule that the courts of one State will not enforce the penal statutes of another State, and held that it was a penal statute because it was so enacted as to provide a punishment as distinguished from an indemnity. (See the numerous authorities cited on page 517 of this report, and also in 9 N. Y. Supp. 247.)

This Hawaiian statute comes clearly within the definition of a penal statute as derived from these authorities, and this is
129 admitted by the Hawaiian court in its opinion upon rehearing in the case of Carter against this Insurance Company wherein it says that this statute "may be regarded as a penalty or forfeiture in case of a divorce for the offence of adultery." This court will not, therefore, enforce this penal statute of a foreign country.

Third. The respondent was domiciled in California at the time when, it is claimed, the statute worked a forfeiture of this policy of insurance.

It is the accepted doctrine that personal property is governed by the law of the domicile of the owner.

Whitney *v.* Dodge, 105 Cal. 197;
3 Am. & Eng. Ency. of Law, 567, 568;
Story on Conflict of Laws, section 472.

The domicile of respondent when, it is claimed, this statute worked this forfeiture, was in California. This statute, as we have seen, provided that when a divorce is decreed for the adultery of the wife, the husband shall hold her personal estate forever. This policy of insurance was personal estate, and under this statute, it could become the property of the husband only when a decree of divorce for adultery of the wife was rendered.

It is admitted that the domicile of respondent at the commencement of the action for divorce, and when the court obtained jurisdiction over her, was in Honolulu, where her husband was then domiciled. We submit that her domicile changed, either
130 when she left Honolulu on the 5th of April, 1894, or when the decree of divorce was rendered on the 24th of August, 1894.

(1.) Her domicile changed when she left Honolulu.

The rule that the wife's domicile is that of the husband is, like all other rules of law, governed by the maxim that when the reason ceases, the rule ceases.

Derby *v.* Derby, 14 Ill. Ap., 647.

The Illinois court, in this case, quotes with approval from Colvin *v.* Reed, 55 Penn. St., 375, the following: "The unity of person created by marriage is a legal fiction, to be followed for all useful purposes, and not to be used to destroy the rights of either, or contrary to the principles of natural justice, in proceedings which, from their nature, make them opposite parties. It required their mutual consent to establish the relation from which that unity arises, and the same law of right demands them to be viewed in their separate natural condition, when either proceeds against the other to destroy their relation. It is the necessary effect of their being opposite parties to the proceeding."

In Mellen *v.* Mellen, 10 Abb. New Cases, 331, the court said: "When the husband began his action to dissolve the marriage contract, the theoretic identity of person and interest ceased to
131 exist, and the legal fiction of the one domicile no longer operated." This language is quoted and approved in Hewes *v.* Hewes, 16 N. Y. Sup., 119.

This doctrine, so well expressed by the Illinois, New York, and Pennsylvania courts, fits the facts of the case at bar. When the husband closed the doors of the home upon the wife and refused to allow her to enter this home; when he sold out their household furniture without her consent, and in the face of her objections; when he turned her adrift upon the street with her child, without money, and prevented her from obtaining the necessaries of life at his expense by publishing warning notices against her in the public

papers, when he destroyed the fiction of marital unity by bringing an action for divorce against her on the charge of adultery, surely the reason for the existence of this fiction of marital unity of person and domicile ceased, and the necessity arose for the wife's obtaining a separate domicile of her own. We say, "when the husband" did these things, because these acts of his guardian were his acts, if the bringing of the suit for divorce by the guardian was his act.

There was no reason why she should choose to retain his domicile. There was every reason she should seek an independent one of her own. In the town of Honolulu she was evidently in the midst of interests adverse to herself; she feared, and had reason to fear, that her infant child would be taken from her; she was charged with a very serious marital offence, and had, therefore, reason for
132 leaving such a restricted country, and for seeking a home of her own beyond the seas, and in a country where the laws as to married women are more in consonance with justice and humanity. Furthermore, her husband was practically dead, his reason had fled, he was no longer to her or his friends a living being, other than merely in the flesh. He was apparently, and, as it turned out, really afflicted with an incurable attack of softening of the brain. He had been adjudged an incompetent person, and the care of his person and estate put out of her hands and into the hands of a guardian. She was denied access to him. He was, therefore, no longer in fact her husband, either in mind or body. This was an additional very strong reason, which, coupled with the others, justified her in choosing an independent domicile. Appellant contends that respondent was excluded only from the house in which she formerly lived, but that the evidence does not show that she could not have obtained a home elsewhere in that country, and that, if she did not have a home in Honolulu, it was because she did not choose to assert her rights. The testimony shows that she asked her husband's guardian to give her a home and some money, and that he told her that he had no money to give her, that he could give her no home, that she could go where she liked, but that he would give her money to leave the country if she would give up her child (Trans., fol. 183–185). It would seem that this was sufficient to destroy such a mythical illusion as the fiction of unity of domicile of husband and wife.

133 (2.) Her domicile changed when the divorce was decreed, if it did not change before.

If, however, she was not enabled by these circumstances to change her domicile in law, prior to the decree of divorce, this domicile did change in law the moment the decree was obtained, because the decree ended the marriage, and, therefore, ended the fiction of the one domicile, and the new domicile that existed in fact became thereby instantaneously the new domicile in law. On the instant of the rendering of the decree she was free from the bonds of matrimony, and at liberty to change her domicile. On that instant, if not before, her domicile was in law changed. Her domicile did not continue in Hawaii an instant after the decree took effect.

It is claimed by appellant that this Hawaiian statute took effect

simultaneously with the decree of divorce, because it provides that when a divorce is decreed for the adultery of the wife, the husband shall hold her personal estate forever. It cannot, of course, be denied that the decree of divorce itself ended the fiction of one domicile, and that, as respondent, when the decree of divorce was rendered, was actually a resident in California, with the intention of remaining here, therefore her change in domicile in law was co-existent with the rendition of the decree of divorce. The most, therefore, that can be claimed by appellant is that the decree of divorce, the legal change of domicile, and the taking effect of
134 the statute were simultaneous. This court, therefore, must give precedence to either the change of domicile, or the taking effect of the statute, as the statute, not having any extraterritorial effect, cannot take effect upon this insurance policy, unless it took effect prior to the wife's change of domicile. In such a dilemma this court's course is very easy of determination, as the courts of this country, not only under the decisions above mentioned, but under our civil code, always defeat a forfeiture, if possible. Under this rule, as the statute attempts to work a forfeiture, our court must give precedence to the change of domicile, and thus prevent a forfeiture.

(3.) There is nothing in our code that militates against this change of domicile. Section 129 of the Civil Code provides that "after separation, either husband or wife may have a separate domicile, depending for proof upon actual residence, and not upon legal presumptions."

The learned counsel for appellant contends that this provision of the code may simply be the recognition of a general principle, now firmly established, that, for the purposes of bringing an action of divorce, the wife may have a different domicile from the husband. The answer to this contention is, that this same section in another clause thereof recognizes this general principle, by providing that "in actions for divorce the presumption that the domicile of the husband is the domicile of the wife does not apply." Is not
135 this section of the code rather a recognition of the principle set forth in Derby *v.* Derby, 14 Ill. Ap. 647, *supra*? Is it not a recognition of the modern and true doctrine that, as the legal unity of husband and wife is only a fiction of the law, this legal fiction ends when the unity in fact is broken up by actual separation?

If a wife may obtain an independent domicile for the purpose of suing for divorce, and thus complete the destruction of the home, why may she not obtain an independent domicile in order to obtain a home?

If the husband cannot desert his wife, move into another jurisdiction, and then, in an action against her for divorce, treat her domicile as having in law followed his, why should he be allowed to drive her from his home, and still in law chain her domicile to his?

II.

The decree of divorce did not work a divestiture of respondent's title to the policy of insurance.

Appellant, in its brief, argues very strenuously that the title to the personal estate of the respondent was determined by the decree of divorce, and that the determination of this title by this decree was an incident of the divorce that must be recognized wherever the divorce is recognized.

Appellant's entire argument upon this branch of the case is based upon the assumption that the Hawaiian court in the divorce case had jurisdiction over the personal property of respondent,
136 because it acquired jurisdiction over her personal status. We must respectfully submit that this assumption begs the whole question.

Under the decision of the Hawaiian court in construing this Hawaiian statute as to forfeiture of the wife's property for her adultery (Carter *v.* Mutual Life Insurance Co., *supra*), the wife's property vests in the husband, not under the decree of divorce, but under the statute. The Hawaiian court in the opinion above mentioned said that this right of the husband to the wife's personal property, when she is divorced for her adultery, "is not a marital right," but "is one of property under the statute." Without this statute the right would not exist. This decision is in accord with the authorities cited by appellant in its brief (pp. 16–18). In Bamford *v.* Failing, 4 Oregon 30 (cited by appellant), the court, in construing an Oregon statute providing for the division of property consequent upon divorce, said "the desired result would be produced by the law, and not by the formal words of the decree."

Although this statute may make this forfeiture of the wife's personalty, practically in Hawaii, an incident of the Hawaiian divorce, it is not such an incident elsewhere, as the statute does not operate extraterritorially.

There may be incidents to a decree of divorce which obtain in the jurisdiction where it is rendered, but do not obtain in foreign jurisdictions.

The United States circuit court in the case of Barrett *v.* Failing, 6 Sawyer, 479–480 (cited by appellant), lays a special emphasis
137 upon this distinction. In that case, under the law of Oregon, upon the dissolution of the marriage on account of the adultery of either party, the innocent person was entitled to a certain interest in, or portion of, the property of the other. The facts of this case showed that a divorce was obtained by the wife in California, and that she subsequently attempted to enforce this decree of divorce in Oregon as against certain real property there situate that had belonged to her husband, claiming that, under the law of Oregon, she had certain rights in said property accruing from said divorce. The circuit court said that, while admitting that the decree of the California court was valid in Oregon as a decree of divorce, the law of California, unlike that of Oregon, did not provide that a decree of divorce should work a transfer or forfeiture of one-third of

the real property of the one party to the other, and that, if it did so provide, it could have no extraterritorial effect, but would be confined in its operation to the property of the parties within the State of California; and that the plaintiff's decree of divorce, although valid and effectual as such, could have no operation or effect upon real property in Oregon, except with the consent of the State of Oregon, declared in its laws.

Appellant cites Story on Conflict of Laws, section 230*b*, as announcing the law to be that a foreign divorce has all the effect in every other country upon personal property locally situate there, which is properly attributed to it in the forum where it is
138 decreed. In support of this statement the learned author cites only an opinion of Brougham in an old English case, wherein the only point at issue was the right to divorce. In this opinion there is a long rambling discussion upon the general subject of the legality of a divorce in one country, of parties married in another country, but the case does not justify the above unqualified statement of Story. The utmost effect that a divorce in one jurisdiction can have upon property in another is that a valid divorce may be held to terminate certain property rights that are dependent alone upon the continued existence of the marriage state, and this, independent of the situs of the property. Dower is one instance of such property rights. It is a property right arising from marriage and dependent upon the continuance of marriage during the life of the husband. Its assertion depends upon proving such marriage and continuance. The ownership of the policy of insurance in this case is independent of the marriage or its continuance. The proof of a marriage would not prove the respondent's ownership. This ownership did not arise out of the marriage status. The proof of a divorce alone would not show the termination of her ownership. This latter fact depends upon an independent statute without which the divorce is immaterial. In this regard there is a clear distinction between property rights arising *ex natura rei* out of the marriage relation and ending, necessarily, with the termination of the marriage relation, called marital property rights, and all other property rights.

139 The universally recognized rule that personal property is governed by the law of the domicile of its owner is not modified by this statement of Story's, even were it supported by any decisions. If the owner of personal property were domiciled at the time of a decree of divorce within the jurisdiction of the forum rendering the divorce, the laws of such forum would most probably control as to the personal property of such parties, though said property were situated in a foreign country; but, the fact of the domicile of the parties to a divorce case at the time of the rendering of the decree is the essential fact to the obtaining of such jurisdiction over the personal property so situated.

If the respondent's domicile had been in Honolulu when this statute took effect, the statute might have operated to vest in the husband her personal property, because in law it was there situated. As, however, her domicile was not in Honolulu at this time, her

personal property was not in law there situated, and therefore this statute could not operate extraterritorially to vest in the husband her personal property situated elsewhere.

Appellant's contention that the husband's right to this policy was an inchoate right, vesting under this statute when jurisdiction was obtained over respondent in the divorce case, and that therefore he had a qualified ownership in this policy prior to the decree and while she was in Honolulu, is without foundation.

As this statute is a penal statute, it could have been re-
140 pealed pending the divorce proceedings without affecting those proceedings or depriving the plaintiff in that case of any right of property then vested in him, and yet this repeal would have taken away this right of forfeiture.

Kleckner *v.* Turk, 63 N. Y. Rep. 413.

Any right conferred by this statute was not, therefore, an incident to the divorce proceeding necessarily attaching when the case was begun, and to be effective if conducted to a successful conclusion. Any such right was purely a punishment that could become operative only when the decree was rendered, provided the statute was then unrepealed, and then not by virtue of the decree, but only by virtue of the statute. It is not true, therefore, as claimed by defendant, that respondent brought only a qualified ownership in this policy when she came to this country. This policy did not come here with any law impressed on it.

Appellant cites Forbes *v.* Scannell, 13 Cal. 242, in support of his contention that this policy was brought to California impressed with this Hawaiian law. The citation does not support his contention. That case concerned property that had been assigned while at sea by an assignor residing in China to an assignee there residing, and of which almost immediate possession had been taken under the assignment. The property subsequently came into this State with the full effect of the executed contract made abroad impressed upon it.

It was contended in Forbes *v.* Scannell that the foreign as-
141 signment was opposed to the policy of this State, and the court said that there would be more force in this point if there had been an executory agreement to make such an assignment in this State, or if the property had been within this State at the time of the assignment, but that the property and the parties were both out of this State when the contract was made and executed.

Appellant contends that jurisdiction was acquired over this policy, and lays much stress upon the rule that when jurisdiction has once attached, a subsequent change of domicile cannot affect this jurisdiction. This rule we concede. The change of residence of respondent, pending the divorce proceedings, did not operate therefore to divest the court of jurisdiction over this policy, because it had not then any jurisdiction over it, nor would it have had jurisdiction over it had she remained in Honolulu until the decree. Title to this policy, even then, would have been dependent on this statute alone. We, therefore need not, nor do we claim, that the change of

residence on the part of respondent in any way affected the jurisdiction of the court in the divorce case.

The learned counsel for appellant has cited the insolvency law, and supposes the case of an insolvent, after the filing of a petition in insolvency, and before the adjudication in insolvency, removing a part of his property to another State, and cites this as analogous to the act of respondent in removing from Honolulu to California pending the divorce proceedings, and in bringing with her this claim against the insurance company.

142 The two cases are not analagous. The proceeding in insolvency is one by creditors to establish their claims against the property of the debtor, and the filing of the petition gives the court jurisdiction of the subject-matter of the insolvency, but not of the person of the insolvent. The order of the court made at the time of the filing of the petition forbidding the debtor to transfer any of his property, is in the nature of a provisional attachment, or sequestration of his estate, and brings it under the control and dominion of the court. The property of the debtor is from that moment considered in the custody of the court, and, hence, the adjudication of insolvency necessarily relates back to the filing of the petition.

Daily *v.* Superior Court, 61 Cal. 402;
State Investment Co. *v.* San Francisco, 101 Cal. 135;
Bude *v.* Cooper, 109 Cal. 687.

But, even in insolvency proceedings, the transfer of the debtor's property by operation of law, being *in invitum*, does not affect property not actually situated in the State where the law was enacted.

Kelly *v.* Crapo, 6 Am. Rep. 36.

In a proceeding for divorce, in the absence of any provision of law sequestrating or taking into the custody of the court the property of the parties to the divorce case, or if the court does not, under its general equity process, appoint a receiver of said property,

143 the court acquires no jurisdiction over the property of either party. By service of process upon the defendant, or by his or her appearance, it acquires jurisdiction only over the person and personal status of the parties, and can enforce obedience to its orders, prior to final decree, only by process of contempt. Either party may, prior to the decree of divorce, dispose of his or her property, and our court has held, in Greiner *v.* Greiner, 58 Cal. 121, that neither party, pending the divorce case, can prevent the other from so disposing of his or her property. The divorce proceedings of themselves do not operate as a *lis pendens;* nor do they, in the absence of the appointment of a receiver, or of any statute, operate to take the property of either party into the custody of the court, or to give the court jurisdiction over the property of either party. The first moment when the arm of the court reaches out to affect the property of either party is when the lien upon the real property of either party is created by the judgment of the court awarding alimony or distributing the property under the statute.

Nelson on Marriage and Divorce, secs. 939 *et seq.*
Civil Code, secs. 136 to 148.

All of appellant's authorities, including the citation from Platt on the Property Rights of Married Women (a work we appreciate), are based upon the admitted rule that when title to property is
144 once vested, the removal of that property, or of the owner thereof, to another jurisdiction, cannot operate, by reason of any conflict of law, to divest the title of such property so vested. Our contention in this case, however, is that, prior to the decree, the title to her personal property was not vested in the husband; that the decree did not purport to so vest it; that the statute alone assumed this burden, and that it could not have that effect after her change of domicile, as the statute could not operate retroactively to affect property rights as of the time of the appearance of the defendant or service of process upon her in the divorce proceedings, and that, therefore, her husband had neither a lien on, nor any right to, or ownership in, said property when she left Honolulu.

Appellant lays much stress upon the distinction between executory and self-executing statutes, and claims that this was a self-executing statute. This distinction fades when a foreign court is called upon to enforce either as to property in the foreign country. No statute is self-executing except in its own country. It is only between executory and executed contracts that any distinction obtains in foreign courts, and in this distinction we are not now concerned.

In Hawaii this statute is self-executory. In California it can be executed only by a judgment of a court. The mere fact that in Hawaii an Hawaiian statute is made self-executory upon the rendering of a decree, cannot give this statute any extraterritorial effect.
145 If the husband should bring replevin for his wife's personal property after a decree of divorce for her adultery, and, in an Hawaiian court, he need plead only the decree, and the court would take judicial notice of the statute and enforce it. If he were to bring this same action in a California court, he would be nonsuited unless he pleaded and derived title under the statute, and prayed that it be adjudged that title had vested in him under the statute. This is exactly what the appellant insurance company must do in this case.

Appellant cites Hilton *v.* Guyot, 159 U. S., 202, as authority for the proposition that if Henri McGrew had followed the respondent to California, and brought replevin against her to recover physical possession of the policy, he could have produced the divorce decree, and the California court would have been compelled to treat it as a judgment *in personam* as regards property, operating as a valid transfer of this policy, and so enforce it (the judgment) against this policy. Hilton *v.* Guyot sustains no such proposition. It is authority only for the rule that our courts will not enquire into the merits of a foreign judgment against a citizen of this country, if there was opportunity for a full and fair trial before a court of competent jurisdiction, after due citation of the defendant or voluntary appearance under a system of jurisprudence likely to secure impartial justice to strangers, and there was nothing to show prejudice or

fraud. It does not pretend to hold that the courts of this
146 country will, from comity, enforce a penal statute of another country simply because that statute provides certain consequences resultant upon a foreign judgment, and not included in the terms thereof, or that the courts of this country will enforce the provisions of a foreign law simply because they will not from comity, and under certain circumstances, enquire into the merits of a foreign judgment.

We do not consider it material to discuss the question as to whether this court can enquire into the merits of the decree of divorce or its validity or finality. The statute providing for the forfeiture of her property cannot be enforced against her under the circumstances of this case, and therefore it matters not as to the divorce. Moreover, as death has certainly divorced her, it could not benefit her to set aside the Honolulu divorce. We must, however, dissent from the statement in appellant's brief that she "was given a fair and full trial abroad, before a court of competent jurisdiction." The action was begun and prosecuted by the guardian of the husband, contrary to the unbroken line of decisions. No decision can be found anywhere authorizing such a suit, unless under some statutory provision.

Nelson on Divorce and Separation § 729;
2 Bishop on Mar. Div. and Sep. § 523 to 525.

The dissenting opinion in McGrew *v.* McGrew, 9 Hawaiian Rep.
478, demonstrates the unfairness and weakness of the Ha-
147 waiian court's decision in that case. But not only was this unusual procedure sanctioned, but the court went further and refused to issue any commission to take the deposition of respondent in her own behalf. She had left the country in order to keep the custody of her child, and was afraid to return to testify. We do not think, therefore, that the judgment commends itself to our jurisprudence.

We do not think that the treaty between the United States and Hawaii helps the appellant. This treaty provides "that the rights to the personal property of a citizen of either country must be decided finally by the laws and judges in the land wherein the said goods are situated." This is very strong authority for respondent's contention.

Second point.

(1.) A special finding upon the finality of the decree of divorce was not necessary. The findings cover all the proceedings in the action for divorce, and both the Hawaiian laws, and the decisions governing these proceedings, were offered and admitted in evidence. Whether the judgment of divorce was final or not is therefore a conclusion of law. If, however, it be held to be one of the ultimate facts, the absence of any finding thereon is not a reversible error, if respondent's foregoing position be sustained, as, under such a construction, a finding that the judgment of divorce was final would not be sufficient to reverse the judgment from which this appeal is taken.

Morrison *v.* Stone, 103 Cal. 104;
Moore *v.* Copp, 51 Pac. Rep. 630.

148 (2.) The court did not err in refusing to admit evidence of the payment of the insurance policy to the administrator of the estate of Henri G. McGrew. Under the Hawaiian law (section 1448, Compiled Laws of 1884) the child of respondent and Henri G. McGrew was his sole heir. This law was proven in the case and proven by appellant. On page 28 of the transcript, folio 83, is found the following:

"The defendant, to sustain the issues on its part, thereupon introduced the following testimony, which, by stipulation of the parties, had been agreed to be true, subject to any objection thereto which might be made at the trial.

* * * * * * *

"XVIII.

"That a volume entitled 'Compiled Laws of the Hawaiian Kingdom,' and known as 'Compiled Laws of 1884;' and a volume entitled 'Laws of Her Majesty Lilioukalani, Queen of the Hawaiian Islands, Passed by the Legislative Assembly at its Session, 1892,' and known as 'Session Laws of 1892;' and also volumes I to IX of the 'Reports of Decisions Rendered by Supreme Court of the Hawaiian Islands,' are each published by authority, and are received and used in the courts of the Republic of Hawaii as evidence of the laws of said Republic."

If, however, this Hawaiian law had not been introduced in
149 evidence and this court were bound, as appellant claims, by the presumption that the Hawaiian law is the same as the California law, and that, therefore, the respondent would be an heir of Henri G. McGrew, supposing there had been no divorce, still any payment of this policy by the appellant to the administrator of the estate of Henri G. McGrew would not be binding upon her, if the policy is hers. A payment to the administrator of the estate of B of a debt due to A cannot be competent evidence in a suit by A against the debtor to recover this debt, even though A might be an heir of B. The administrator of B might and would have the right to pay out all of this money in satisfaction of the ex-
W. E. B. penses of administration, and of the debts of B, and A would have no redress. Furthermore, a debtor cannot justify the payment of a debt to the wrong person merely because perchance it may eventually go to the right creditor by virtue of inheritance.

In the case at bar the money is alleged to have been paid to the administrator of the estate of Henri G. McGrew, not as the money of respondent, but as the money of said McGrew. There was no testimony offered showing whether all of this money, or how much, has been expended in paying said McGrew's debts or the expenses of administration. If the testimony as to this payment had been admitted, it would have been proven (if it was not proven) that respondent was not his heir (even if there were no divorce). The error, therefore, if it was error, is not a reversible one.

150 (3.) The court did not err in admitting in evidence the bill of exceptions in the divorce proceedings or the rules of

practice of the circuit court of Hawaii relative to the filing of bills of exceptions. These were facts material as to the finality of the decree of divorce. This decree has not been declared final by any court in Hawaii, except collaterally, in the suit of Carter *v.* Mutual Life Insurance Co., to which respondent was not a party.

(4.) The court did not err in overruling appellant's objections to the testimony of respondent. Her testimony so objected to went to the gist of her case.

We, therefore, submit:—

I.

That the decree of divorce did not operate to divest respondent's title to the policy of insurance.

II.

That under the Hawaiian statute alone could this divestiture occur, and it did not occur under that statute, because,—

(1.) Said statute, under its terms, could not take effect until the decree of divorce was rendered;

(2.) When the decree of divorce was rendered respondent was domiciled in California;

151 (3.) This policy, being a chose in action, followed respondent, and is controlled by the law of her domicile, and her domicile changed from Honolulu to California, either (1) when she left Honolulu on the 5th day of April, 1894, with the intention of not returning to Honolulu, because of the suit of divorce begun by her husband, and of her being excluded from her home by her husband; or, (2), when the decree was rendered, because the decree of divorce itself terminated the fiction of unity of person and interest, and allowed her California domicile, which existed in fact, to become her California domicile also in law. This change of the domicile so caused by the decree of divorce, was, in point of time, prior to the taking effect of the adultery statute, as the California law will give it priority in order to avoid a forfeiture.

(4.) Said statute could not take effect upon this policy of insurance after her change of domicile to California, because, (*a*), being a foreign statute, it has no extraterritorial effect; (*b*), it is contrary to the policy of our law, in that it works a forfeiture, which our laws endeavor to avoid, and also attempts to deprive the wife of her separate property in an action for divorce, whereas our law has in every way prohibited such a disposition of her property; and (*c*), it is a penal statute of a foreign country.

The judgment should be affirmed.

Respectfully submitted,

PLATT & BAYNE,
Attorneys for Respondents.

151½ Due service of the within is hereby admitted this 14th day of February, A. D. 1898.

CHICKERING, THOMAS & GREGORY,
Attorney for Appellant.

W. E. B.

152 San Francisco, No. 1230.

In the Supreme Court of the State of California.

ALPHONSINE MCGREW, Respondent,
vs.
MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Appellant.

Appellant's Reply.

Chickering, Thomas & Gregory, attorneys for appellant.
Edward Lyman Short, of counsel.

Filed this Apr. 23, 1898. *day of April, A. D. 1898.*
T. H. WARD, *Clerk,*
By E. S. BUTTERWORTH,
Deputy Clerk.

152½ In the Supreme Court of the State of California.

ALPHONSINE MCGREW, Respondent,
vs.
MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Appellant.

Appellant's Reply.

Counsel for respondent has, for the purpose of argument, conceded that the decree in McGrew *v.* McGrew became final prior to the commencement of the present action. It is, therefore, no longer necessary for this court to concern itself with this proposition, and the first point made by us in opening may be disregarded.

The argument of counsel has now confined the case to this single issue, viz., did the fact that respondent was domiciled in Cali-
153 fornia at the time of the rendition of the decree prevent her personal estate from being affected by the Hawaiian law. One point, however should first be noticed. On page 27, counsel dissents from the statement that Mrs. McGrew was given a fair and full trial abroad before a court of competent jurisdiction, because (*a*) they permitted an action for divorce to be prosecuted by the guardian of an insane person, and (*b*) they refused to issue any commissions to take testimony. The first point we have already answered by showing that this action was prosecuted under a statutory provision which counsel concedes may be done (p. 27). The second point is met by the opinion of the trial judge (fol. 204) by which it appears that it was admitted the witnesses whose testimony was sought to be taken by deposition, would deny the acts charged. This, of course, obviated the necessity of any deposition.

At the outset, we wish to again assert that the question of change of domicile is immaterial. It could make no difference whether Mrs. McGrew could or could not acquire a domicile apart from her husband, and the time when that domicile was changed is equally irrelevant, it being conceded that in any event, it was after the service of process at Honolulu.

Counsel has argued this case throughout as if the statute *ex proprio vigore*, and independent of any judicial proceedings, transferred title. He speaks constantly of the statute "vesting title in
154 the husband," as if it pretended to give to A the property of B without a hearing in court. This is a wrong assumption. The statute simply declares the legal effect of the decree of divorce; it is a section of the chapter in the laws of Hawaii upon the subject of "divorce and separation;" it must contemplate the institution of an action for divorce, because otherwise there could be no decree. Counsel emphasizes the point that the statute did not operate to pass title until the decree was entered. This is so, as in every case property rights are not transferred until judgment, but it does not mean that these property rights may not have been involved in the steps leading up to the decree.

The entry of the decree and the effect thereof, as given by the law, are both necessary to pass title; the two are inseparable, and, therefore, it must logically follow that in every action instituted in that country for a divorce upon the special grounds alleged, the alienation of title of the personal property of the defendant is a necessary incident, and, from the commencement of the action, those personal property rights are necessarily involved, for no decree of divorce on this special ground could possibly be entered, and not have this legal effect.

Counsel say that the law may have been repealed, pending the divorce proceedings. Without admitting the fact, suffice it to say that this law was not repealed during any of the times mentioned, but was in full force both at the time of the commencement of the action and at the time of the rendition of the decree.

155 To repeat, when the divorce action was commenced, respondent's personal property rights were or were not involved in that litigation. If they were, then her change of domicile could not substract anything from that jurisdiction already conferred; if they were not, then the continued domicile in Hawaii could add nothing to that jurisdiction, and the decree could not have affected her property rights, though she remained there.

The argument of respondent would be equally applicable to a state of facts in which it appeared that the libel for a divorce had contained an allegation of the personal property of the wife, and a prayer for its transfer. He would then be obliged to say, as he does now, that the decree did not affect respondent's property rights, because, before it was rendered, she had become domiciled in another country. But to admit such a proposition is to say that any party, when sued for a divorce, can evade the effect of a decree as to property rights, or can escape any liability for alimony, by simply removing to another jurisdiction before the decree is rendered.

Counsel has not referred to our point, which we regard as the essential feature of the case, that by reason of the mandatory character of the statute, it is neither necessary nor proper to refer to property rights, either in the pleadings or in the decree; nor has he combated the proposition that this statute in effect presents precisely

the same question as is involved in those States which give
156 a wife her dower right upon divorce, the same as if the husband were dead. This is a right in the property of the husband, and the authorities cited by us show that this one-third interest passes by operation of law, and that in the language of Mr. Bishop, it would be a "jurisdictional impertinence" for the court to make any mention of it in its decree.

We claim that whatever must flow by operation of law from a decree of court, is necessarily within the jurisdiction of that court in the proceedings leading up to that decree. Jurisdiction is conferred upon courts by the constitution and laws of the country in which they are. The fact that the statutes of California do not authorize a court in a divorce proceeding to award the separate property of the wife, does not, of course, prohibit the laws of Hawaii from conferring that power upon their courts. All divorce jurisdiction is peculiarly a matter pertaining to the domicile of the parties. When the statute of that country, therefore, conferred upon its court the power to hear and determine an action for divorce, and said further that the legal consequences of a certain judgment of divorce shall be that the property rights of the wife are divested, it conferred upon the court the power to hear and determine those property rights by virtue of its adjudication as to the status. The fact that no *lis pendens*, attachment, or other process of sequestration was issued cuts
no figure, because such proceeding is important only as regards
157 third parties. It could not add anything to the jurisdiction of the courts, and since it is not claimed that respondent sold or assigned the policy *pendente lite*, such process would have been useless.

We deem it, therefore, unnecessary to refer at length to the argument of counsel as to when and how this change of domicile took place. As it seems to us, all the assignments of error on account of the objections to the testimony of the respondent should have been sustained. Suffice it to briefly refer to his argument *seriatim:*

First. This is not an effort to execute or enforce this Hawaiian law in the courts of this country, because it has already been executed there. All the cases cited by respondent show an effort to enforce *de novo* the statute of one State without having first reduced it to a judgment in its own jurisdiction, as if no suit for divorce had been brought in Hawaii, but the parties had begun such an action in California and attempted to compel the California court to enforce the foreign statute in such an action. This, of course, could not be done. This statute is not contrary to the policy of the State of California or its laws. It, of course, differs from our laws, but that does not mean that it is opposed to its policy. "The settlement of property rights between the parties is an incident of every decree for divorce where there is any property involved."

Mott *v. Id.*, 82 Cal. 413;
Gaston *v. Id.*, 114 Cal. 542.

158 The method by which this property shall be assigned, and in what proportions, varies in every jurisdiction.

In our opening, we showed that in six States of the Union this identical statute is in force. In our own State, upon a divorce being granted for the adultery of one of the parties, the court may award all the community property to the innocent party

Civil Code, sec. 146.
Eidemuller *v. Id.*, 37 Cal. 364.
Gaston *v. Id.*, 114 Cal. 542.

This disposition of property, from the standpoint of natural justice, must frequently be more harsh and arbitrary than is the Hawaiian statute.

Nor is it an argument against this statute to say that it provides for a forfeiture. The fact that our law disfavors forfeiture, does not mean in an international sense. This is but a rule of construction, to be applied when the law is couched in ambiguous terms. But if there is no such ambiguity, the rule has no application. There are upon our own statute books many laws imposing forfeitures. (Oakland R. R. Co. *v.* R. R. Co., 45 Cal. 365.) The policy of California is, therefore, not opposed to them.

Second. Nor is this Hawaiian statute a penal statute, in an international sense. The definition of a penal statute, in this connection, has been settled in this country by the leading case of Huntington *v.* Attrill, 146 U. S. 657.

159 It is there held that the word "penal," as used in the expression, "the courts of one country will not enforce the penal laws of another," means a statute which has for its purpose the punishment of an offense against the public justice of the State, and not to afford a private remedy to a person injured by the wrongful act.

This decision is furthermore pertinent to the case at bar, in that one of the grounds upon which it was claimed that the statute thereon sued on was penal, was that the local court, in Huntington *v.* Attrill, 118 N. Y. 365, had decided that this was a penal statute; but the Supreme Court of the United States say (page 679):

"Nor can those decisions, in any view, be regarded as concluding the courts of Maryland, or this court, upon the question of whether this statute is a penal law, in the international sense."

This is a question not of local, but of general law, or, as said by the court (page 683):

"In this country, the question of international law must be determined, in the first instance, by the court, State or national, in which the suit is brought. If the suit is brought in the circuit court of the United States, it is one of those questions of general jurisprudence which that court must decide for itself, uncontrolled by local decisions."

We submit, that this decision is conclusive upon the contention of counsel, in two respects: that this Hawaiian law is not a penal statute, in the international sense, and the fact that the

160 Hawaiian court so denominated it is not binding upon this court.

At the time the policy in suit was made, executed and delivered

the McGrews unquestionably, and the insurance company at least *pro hac*, were resident and domiciled in Hawaii. The contract was not only executed and delivered, there, but the premiums were paid there, and on its face its obligation was to be performed there. It is then distinctly a Hawaiian contract and under accepted principles of American jurisprudence is to be governed in its enforcement by Hawaiian law. (Equitable Life Assurance Society *v.* Clements, 140 U. S. 226; Liverpool Steamship Co. *v.* Phenix Ins. Co., 129 U. S. 397, 458.)

Immediately upon the issuance of the policy the money to become due under it belonged to the beneficiary, Alphonsine, (Central National Bank *v.* Hume, 128 U. S. 195) subject only to forfeiture at the instance of the company for non-payment of the premiums. It was a valuable asset of her personal estate; it was part and parcel of her personal property. Its subsequent forfeiture to the husband for a violation of the Hawaiian statute policing the status of marriage in that country, judicially found and declared by a competent Hawaiian tribunal, was and is purely a question of Hawaiian domestic law, which both in point of theory and execution is civilized law.

In the suit for divorce by Henri against Alphonsine, the latter was personally served with process, appeared and was de-
161 fended by counsel throughout the continuance of the suit. That she left the islands prior to its conclusion and before entry of the decree, renders that decree none the less effective.

It seems quite unnecessary here to pursue the question raised on behalf of Alphonsine, whether it is the decree of divorce for the special cause, or the statute acting thereupon, that operates to transfer her personal estate to her husband. The truth is, that the decree established with respect to a particular wife the existence of a fact which make applicable to her personally the provision of a statute applicable to all Hawaiian wives, who have so violated their marriage vows. By the law of the land, the guilt of the woman ascertained by a judicial proceeding and eventuating in a decree of divorce on such ground causes the transfer of her personal property just as under the same law the same guilt so ascertained and declared, causes an annulment of the woman's status of wife. The so-called penalty of transfer is part and parcel of the penalty of annulment to which it is incident. Nor does the transfer depend upon the mere wording of the decree, although it does upon its existence, for an express exception of the transfer embodied in the decree in any particular case would clearly be invalid. Generally speaking, upon the entry of the decree the transfer occurs *ipso facto*; the right of the wife to enforce pre-existing contracts for personal property ceases—and as between herself and other inhabitants of Hawaii the contractual bond in such cases, is
162 severed. If then she could not in Hawaii enforce a Hawaiian contract to which she was a party, how shall she be permitted to enforce such contract elsewhere, for a contract invalid by the law of the place where made is invalid everywhere, and this does not infringe that other principle of law that foreign nations will not lend

themselves to the enforcement of penalties—for the case here presented is one where the penalty had already been enacted and enforced by the Hawaiian statute which operated upon the decree of divorce. The question really suggested by this record is not whether a foreign court will lend itself to the enforcement of a foreign penal statute, but whether when a penalty has been exacted by a foreign statute, a court of another sovereignty will interfere to restore it to the culprit, *i. e.*, when personal property has been transferred by operation of the Hawaiian statute from the divorced wife to the wronged husband, both citizens of Hawaii, will a court of California take it upon itself to restore it to the woman?

In attempting to recover this chose in action from the insurance company, the plaintiff is met at the threshold by a defect of title to sue. This defect in title is a thing existing, it is not executory.

Third. Whether this policy belongs to the respondent or to the insured's estate is *res adjudicata*.

It was a part of the issues in the divorce proceedings and was determined by the decree of the Hawaiian court by virtue of which, and simultaneously with which, the personal property of the
163 respondent passed to the insured, under the laws of the country in which the decree was rendered and to which she voluntarily submitted.

The Hawaiian court had full jurisdiction of the person of Mrs. McGrew, and jurisdiction of her property to the extent that the questions connected with the same were incidental by the Hawaiian statute to the divorce suit. The domicile of Mrs. McGrew was in Hawaii. The court having once obtained jurisdiction, Mrs. McGrew could not divest that jurisdiction by leaving the State, and her domicile at the commencement of the suit being Hawaii fixed for all the purposes of the action the situs of her personal property there. She could not change the situs of the personal property by herself removing from the jurisdiction. Even if we concede that she might change her domicile, she could not change her domicile so as to affect the pending proceedings.

If the decree had been the decree of a court of California and its scope and effect had been determined by statute such as the Hawaiian statute, this action would have been defeated by a mere production of the decree at the trial. So a complete defense was established upon proof of the Hawaiian decree of divorce, and of the statute which gave character, scope and effect to it. "The judgment of a foreign court duly proven is conclusive upon the parties when there has been a trial on the merits, and no fraud, mistake or want of jurisdiction is shown." (Lazier *v.* Westcott, 26
164 N. Y. 146; see also Dore *v.* Thornburgh, 90 Cal. 64.)

"The provision of the existing statutes (of Massachusetts) affirming the validity of foreign divorces made no change in the law; but in the words of the commissioners upon whose advice it was enacted, is founded on the rule established by the comity of all civilized nations; and is proposed merely that no doubt should arise on a question so interesting and important as this may sometimes be." (Ross *v.* Ross, 129 Mass. 243, 248.)

The necessity of alleging and proving, in this case, the statute which enlarged the scope of the Hawaiian decree so as to include the property rights of the respondent, arose from the fact that otherwise the court could not have treated it as having a broader effect than its own decree in a similar action; and the appellant would have been deprived of his rights under the foreign statute, for in the absence of evidence to prove the law of another State it will be presumed to be the same as that of the forum. (Marstens *v.* Lash, 61 Cal. 622.)

The respondent's property rights, including her right to the policy, composed part of the subject-matter of the divorce action. The statute of Hawaii made her continued ownership of this policy, as part of her personal estate, depend upon the result of the action, upon her success in establishing that she was innocent of the charges of adultery of which *prima facie* she was proved guilty.

We repeat, her property rights composed part of the subject-
165 matter of the action. The subject-matter of an action is defined as "the cause; the object; the thing in dispute." (Bouvier Law Dict.) "The matter or thought presented for consideration in some statement or discussion." (Webster Dict.) In an action for divorce "jurisdiction of the subject-matter is the power lawfully conferred to deal with the general subject involved in the action." (Hunt *v.* Hunt, 72 N. Y. 217).

The general subject involved in the action in which a decree of divorce was rendered against the respondent was the marital status of the parties and all things incident thereto including property rights. Forfeiture to the aggrieved spouse of the property of the delinquent, either in whole or in part, has always been recognized as a necessary concomitant of the decree. A decree against the wife extinguishes her dower right; against the husband, his rights as tenant by the curtesy. But, it is argued, these particular rights accrue upon the marriage, and it is only logical that they should become extinct upon the annul*l*ment of the marriage. This argument is based upon a false premise, upon the assumption that the rights of dower and courtesy are other than creatures of the law; liable to extinguishment by act of the legislature at any time, as the law which gave to the husband all of his wife's personal estate and the rents of her real estate was repealed long ago. Indeed, the statute of Hawaii, in making the decree operative as a transfer of the unfaithful wife's personal estate, secures to the husband, by way
of compensation for her perfidy; that which would
166 have been his as of course under the common law. In New York, the court of appeals has held that the wife's dower right in real estate is not cut off by a divorce dissolving the marriage contract on the ground of adultery of the husband. "A divorce at common law avoided the marriage *ab initio*," said the court. "It was equivalent to a sentence of nullity under our statute. It placed the parties in the same relation to each other as though there had been no marriage. The issue of the marriage were bastardized. * * * Until our statute, there was no such thing as divorce which recognized and admitted the validity of the marriage, and

avoided it for causes happening afterwards. Such a divorce is alone the creature of the statute. The principles applicable to a common-law divorce cannot be made applicable to a divorce which admits the validity of the marriage and the rights and obligations resulting from it. The effect of such a divorce must be determined entirely by the provisions of the law under whose authority it is granted. The common-law divorce avoided the marriage and all rights and obligations resulting from it. The statutory divorce is limited in its operation and only affects the rights and obligations of the parties to the extent declared by the statute. The marriage being valid, the rights it conferred, and the obligations it imposed, continue, where the legislature has failed to interfere."

Wait *v.* Wait, 4 N. Y. 95, 100.

167 The soundness of these views is recognized by the United States Supreme Court in Barrett *v.* Failing (111 U. S. 523) in which the New York case is cited and approved, and which contains the following language applicable to the present contention:

"It is not doubted that the decree of divorce from the bond of matrimony, obtained by the plaintiff in California in a court having jurisdiction to grant it and after the husband had appeared and made defense, bound both parties and determined their status. The question considered by the court below and argued in this court is whether by virtue of that decree, and under the law of Oregon the wife is entitled to one-third of the husband's land in Oregon. Unless otherwise provided by local law, a decree of divorce by a court having jurisdiction of the cause and of the parties dissolving the bond of matrimony, puts an end to all obligations of either party to the other, and to any right which either has acquired by the marriage in the other's property, except so far as the court granting the divorce in the exercise of an authority vested in it by the legislature orders property to be transferred or alimony to be paid by one party to the other." The learned court points out that the order "does not of itself transfer any title in real estate, unless allowed that effect by the law of the place in which the real estate is situated," thus upon the principle *expressio unius exclusio alterius*, impliedly hold-

168 ing that the order would have the effect to transfer the personal estate of the offender situated in another State, and if there was nothing prohibitive in the law of that other State, the real estate situated there, also.

In Ross *v.* Ross (129 Mass., at page 248) it is said:

"As to foreign divorces it is well settled in this Commonwealth, that a decree of divorce rendered in another State, in which the legal domicile of the parties is at the time, and according to its laws, even for a cause which is not a ground for a divorce by our laws * * * is valid here and conclusive in a suit concerning a husband's interest or wife's dower in lands in this Commonwealth," a principle, as intimated by the learned court, founded upon the comity of all civilized nations.

If a foreign decree puts an end to existing rights of property belonging to the guilty party (as in Barber *v.* Root (10 Mass. 260) in

which a decree against a husband rendered in Vermont was held to determine his rights to the rents of his wife's real estate in Massachusetts) surely its effect can be broadened even to the creation of new rights in favor of the innocent. In applying the rule founded upon the comity of nations, courts do not discriminate as to laws. Whether it annexes one incident to a decree of divorce or another, whether it gives to the innocent husband all he would have been entitled to of his wife's property in case she were actually deceased, or merely lops off the incubus of an abandoned woman, dead to him alone, and sets him free; in either case, the law will be re-
169 spected and enforced in its most far-reaching effect. He is entitled to assert the property rights passing to him under the decree, in the courts of all nations amenable to the principle of comity. Did this policy pass to the intestate according to the law of Hawaii? If so, upon what principle shall it be said that within this State it still remains the property of the respondent?

Referring to the binding effect upon a wife's property in the District of Columbia, of a decree of divorce rendered against her in Indiana, said Mr. Justice Swayne, expressing the unanimous opinion of the United States Supreme Court: "The decree rendered in Indiana, so far as it related to the real property in question, could have no extraterritorial effect; but, if valid, it bound personally those who were parties in the case, and could have been enforced in *situs rei*, by the proper proceedings conducted there for that purpose." So, if the intestate in this case had come into this State and had instituted proceedings to recover the policy, supposing it to have been in his wife's possession, he would have recovered upon proof of the decree and the statutory effect of it.

W. E. B.
Cheever *v.* Wilson,
9 Wall., p. 121.

Again, if it were necessary to secure to the appellant the benefits of the Hawaiian decree, this court would have the power to compel the respondent to execute a transfer of the policy to the appellant. In a case decided as recently as January, 1897, by the supreme court of Massachusetts, the defendant had executed to his wife in North Carolina, where both were domiciled, a covenant to surren-
170 der to her all his marital rights to certain lands belonging to her situated in Massachusetts, in consideration that she should forbear suing for divorce. A bill to enforce the covenant in the State of Massachusetts was demurred to on the ground that the contract executed in North Carolina was not binding as to lands in Massachusetts. In overruling the demurrer and holding that the plaintiff, the wife's administrator, was entitled to an injunction restraining the defendant from asserting as against the plaintiff any title to the real estate in question, and to an order directing a conveyance to the plaintiff of all the defendant's right, title and interest therein, said the court:

"It is true that the laws of other States cannot render valid conveyances of property within our borders which our laws say are void, for the plain reason that we have exclusive power over the *res*. But the same reason inverted establishes that the *lex rei sitæ* cannot

control personal covenants, not purporting to be conveyances between persons outside the jurisdiction, although concerning a new thing within it. Whatever the covenant, the law of North Carolina could subject the defendant's property to seizure on execution, and his person to imprisonment for a failure to perform it. Therefore on principle the law of North Carolina determines the validity of the contract," citing numerous authorities (Polson *v.* Stewart, 167 Mass., 211, 214).

Further, the Hawaiian courts, having jurisdiction of the person of the respondent, could have compelled her to execute such a transfer, assuming the situs of the policy was in this State, following
171 the respondent's domicil, for "it is immaterial that the *res* of the controversy, whether it be real or personal property, is beyond the territorial jurisdiction of the tribunal. It has the power to compel the defendant to do all things necessary according to the *lex loci rei sitæ* which he could do voluntarily to give full effect to the decree against him. Without regard to the situation of the subject-matter, such courts consider the equities between the parties and decree *in personam* according to those equities, and enforce obedience to their decrees by process *in personam*," (Phelps *v.* McDonald, 99 U. S. 298, 308).

Upon the question of jurisdiction an action to compel a transfer would be regarded as merely ancillary to the divorce action, and the Hawaiian court which rendered the decree in the original, might grant the relief sought in the ancillary action without regard to the present citizenship of the respondent. (Pacific R. R. of Mo. *v.* Missouri P. R'y 112 U. S. 505, 522.) The principle indicated is a familiar one, and has been applied in a variety of ways. In Banks *v.* Calhoun (102 U. S. 256) a Federal court had taken possession of the mortgaged railroad in a foreclosure suit. It was held that having thus taken possession of the subject-matter of the litigation, the Federal court had acquired the right to decide upon all conflicting claims to the possession and control of the road, and that an attachment suit which had been begun in a State court could be properly removed by stipulation to the Federal court, because "the
172 parties did no more than what they could have been compelled to do by the injunction of the Federal court, and what would have been done by such compulsory order, if they had not submitted to it by agreement."

We have shown upon authority (Polson *v.* Stewart, *supra*) that the interstate, through the courts of this State of California, could have compelled an actual transfer of this policy, if necessary to carry into effect the foreign decree.

Now, we contend that what the interstate might have done by prosecuting an action, this appellant is now doing by defending an action, namely, asserting the right to the policy to which it has been subrogated, upon the ground that it passed to the interstate under the decree of divorce, by which the respondent is bound and by which she is estopped.

It is not to be lost sight of that no rights of innocent third parties are involved herein. Indeed at any time pending the divorce pro-

ceedings, the intestate would have been entitled to an injunction restraining any disposition of the policy to his prejudice, as by disposing of it to an innocent third person for value, upon the ground that the policy was a part of the subject-matter of the suit, and such a disposition of it would *render* the decree against the respondent ineffectual in the language of the code. (Cole *v.* Cunningham, 133 U. S. 107, 117.)

We deny that there is any merit in the respondent's contention that the Hawaiian statute is against the public policy of this
173 State. To what extent the property of the delinquent shall be appropriated in divorce suits, and handed over to the innocent injured party, is peculiarly a matter to be determined by the legislature of the State or country to the restraint and control of whose laws the parties have submitted their persons and property. The views of the various State legislatures upon the question of property rights of divorced persons are diverse indeed, but they are respected and enforced in all courts. Why then should the laws of a foreign country, which, to say the least, are not more oppressive upon the offender than some of our own State laws, be not regarded with equal respect.

Fourth. If public policy could be successfully invoked under the circumstances of this action, it would not be long before the principle of international comity would become a thing of comparatively little importance indeed.

But we contend that respect for the Hawaiian decree is secured by treaty stipulations, which sometimes smooth the way for the recognition, in doubtful cases, of the effect of foreign judgments upon property rights and interests. By treaty concluded between this country and Hawaii in 1849, it was provided that "if a question should arise among several claimants as to which of them said goods belong, the same shall be decided finally by the laws and judges of the land wherein the said goods are" (Treaties and conventions concluded between the United States and other powers (1889) p. 550).

174 We call special attention to the words, "if a question should arise," in this provision of the treaty. The provision is to be construed to mean that the laws and judges of the land wherein the said goods are when the question shall arise, shall decide the ownership.

In this case there can be no doubt as to where the "goods" were when the question arose, within the meaning of the treaty. question arose when the divorce action was commenced; for the ownership of the policy (which, by intendment, is to be included in the word "goods") was, by express statute, made to depend upon the result of that action; in other words, it was involved in it as completely as was the question of divorce. It is not at all material where the policy was at the beginning of this present action, but when it was when the respondent, by appearing in the divorce proceedings, submitted to the jurisdiction of the Hawaiian court. To hold otherwise would be to disregard this treaty.

"With us a treaty is a part of the supreme law of the land; as

such, it influences and controls the decisions of tribunals * * * Nations are bound to maintain respectable tribunals, to which the subjects of States at peace may have recourse for the redress of injuries, and the maintainance of their rights. If the character of these tribunals be respectable, impartial and independent, their decisions are to be regarded as conclusive."

This is the language of Daniel Webster, when, as Secre-
175 tary of State, he was called upon to discuss the treaty between this country and Spain in 1842 (2 Wharton on International Law, 2nd ed. pp. 29–30) treaties adopted by the executive department should be followed when not repugnant to the language or purpose of the treaty" (Castro *v.* De Uriarte, 16 Fed. Rep. 93).

"It must always be borne in mind that the constitution, laws and treaties of the United States are as much a part of the law of every State as its own local laws and constitution. This is a fundamental principle in our system of complex national polity" (Hauenstein *v.* Lynham, 100 U. S. 483, 490; Shanks *v.* Dupont, 3 Pet. 242; Foster *v.* Neilson, 2 Pet. 253; The Cherokee Tobacco, 11 Wall. 116.)

Claiming under this treaty, as being a part of the supreme law of the State of California, the appellant submits that its terms should be liberally construed. If the word "goods," used in the treaty can be construed so as to include a policy of insurance, it should receive that construction. "Where a treaty admits of two constructions, one restrictive as to the rights that may be claimed under it, and the other liberal, the latter is to be preferred." (Hauenstein *v.* Lynham 100 U. S. 483, 487).

The appellant's right to invoke this treaty is undoubted, for, as a well-known writer has said, international treaties "apply to the judgments of the courts, irrespective of who it is that pleads them" (Bars International Law, 2nd ed., p. 983), and, as appears from the cases cited, they are part of the supreme law of the contracting parties.

176 Counsel has cited the case of Barrett *v.* Failing, 6 Sawyer, 473, as authority for the proposition that a statute of Oregon, providing for a transfer of real estate upon the rendition of a decree of divorce, could have no extraterritorial effect. This decision, as well as that rendered by the Supreme Court of the United States in affirming the judgment (111 U. S. 523), is very pertinent to the case at bar, in that it holds that where the statute is mandatory, no allegation nor proof concerning the property rights is necessary, and it further concedes (6 Sawyer, 479) "that the legislature has the power to provide that a decree of divorce pronounced in the courts of another State shall have the same effect upon the real property of the parties in this State, as if given here." But, on the point cited by counsel, this decision does not sustain him. The court had to decide whether a divorce rendered in California passed title to real estate in Oregon, under a statute of the latter State. And the decision is, that the legislative intent evidently was, that the statute should apply only to a divorce rendered in the Oregon courts, because it occurs in a code of procedure where any reference to an action must refer to an action under that code. This decision is

clearly right. We do not claim that this Hawaiian statute would apply, if the divorce was decreed in any other country, even to personal property in Hawaii. It is not necessary to consider that question, because the divorce was rendered in the same country
177 that enacted the law. If we will suppose an action for divorce to have been brought in Oregon, and a decree obtained there, and afterwards an action to be brought in California by the same parties, for the rental of the lands transferred by virtue of the divorce decree, then the cases would be analogous.

Fourth. The ruling of the court in refusing to recognize as binding or controlling upon it, the fact that the policy had been already paid to an administrator appointed by the Hawaiian court was erroneous beyond the shadow of a doubt, if the case of New England Mutual Life Insurance Company *v.* Woodworth (111 U. S. 138) is to be accepted as a precedent. In that case the rule is stated that:

"A policy of life insurance, issued by a company incorporated in one State, payable to the assured, his executors or administrators, is assets for the purpose of founding administration upon his estate in another State, in which the corporation, at and since the time of his death, does business, and, as required by the statutes of that State, has an agent on whom process against it may be served."

In arriving at this conclusion said the court:

"The general rule is that simple contract debts, such as a policy of insurance not under seal, are for the purpose of founding administration assets where the debtor resides, without regard to the place where the policy is found, as this court has recently affirmed in Wyman *v.* Halstead, 109 U. S. 654. But the reason why the State which charters a corporation is its domicil in reference to debts which it owes, is because there only can it be sued or
178 found for the service of process. This is now changed in cases like the present; and in the courts of the United States it is held that a corporation of one State doing business in another, is suable in the courts of the United States established in the latter State, if the laws of that State so provide, and in the manner provided by those laws."

The propriety of this decision has been recognized repeatedly and in no case has it been questioned. Of course, if this court refuses to be bound by the Hawaiian decree of divorce, and its effect upon the respondent's property rights, the case does not apply, otherwise it is entirely applicable.

The case is applicable, also, in construing the words of the treaty above discussed, viz., "where the said goods are," "when the cause of action arises," for the appellant carried on business in Hawaii, at the death of the insured, in conformity to the requirements of the Hawaiian statute, enabling resident creditors to bring suits there against corporation created by foreign laws and was, therefore, to be regarded as domiciled within Hawaii. Therefore, whether the cause of action is to be considered as having arisen when the decree of divorce was rendered, or when the action by the Hawaiian administrator to recover upon the policy was brought, in either case the "goods" were in Hawaii.

Under the laws of Connecticut, this policy would have been forfeited to the insured, for, under those laws, property, real or personal, received from the husband in consideration of mar-
179 riage, or love, or affection is decreed to the husband. In Maine, Vermont, Rhode Island, Nebraska and Arizona, upon divorce for adultery of the wife, the husband holds all the personal estate of the wife, except that the court may in its discretion grant her a subsistence thereout; but more than that, he holds all her real estate for her life, thus equalling the severity of the Hawaiian laws.

Nor can this ruling be sustained upon the ground that the offer was to show that a payment had been made to the administrator of the estate of McGrew, not as the money of the respondent, but as the money of Henri McGrew. The offer (fol. 112) was that the full amount of the policy had been paid to the administrator on account of a full receipt and release of all claims on account of and by reason of the said policy, and also in consideration of the cancellation and redelivery of the policy to the company; thus to show a payment not as a discharge merely of the obligations due to the estate of Henri McGrew, but as a discharge of all obligations on the policy to whomsoever they might have been due.

We submit that in the present aspect of the case, this refusal to permit evidence of the payment and of the cancellation of the policy was reversible error. It was, of course, no longer necessary after this ruling had been made, to show that Henri McGrew was solvent at his death, and that a portion, if not all, of this payment, would go to his heirs.

Respectfully submitted,

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Attorneys for Appellant.

EDWARD LYMAN SHORT, *Of Counsel.*

179½ Due service by copy of the within reply brief is hereby admitted this 20th day of April, 1898.

PLATT & BAYNE,
Attorneys for Respondents.

W. E. B.

180 S. F., No. 1230.

In the Supreme Court of the State of California.

ALPHONSINE McGREW, Respondent,
vs.
MUTUAL INSURANCE COMPANY OF NEW YORK, Appellant.

Respondent's Reply Brief.

Platt & Bayne, attorneys for respondent.

Filed this 30 day of April, A. D. 1898.

TROWBRIDGE H. WARD, *Clerk.*
By A. W. JOHNSON, *Deputy Clerk.*

W. E. B.

180½ San Francisco, No. —.

In the Supreme Court of the State of California.

ALPHONSINE McGREW, Respondent,
vs.
MUTUAL INSURANCE COMPANY OF NEW YORK, Appellant.

Respondent's Reply Brief.

Counsel for appellant having submitted in their reply brief some additional authorities, we beg leave to reply to the same.

I.

Appellant says (page 7, Reply Brief): "The policy of
181 California is, therefore, not opposed to them" (meaning forfeitures), and bases this statement upon Oakland R. R. Co. *v.* R. R. Co., 45 Cal. 365. This was a case in which a penalty prescribed by a local statute was enforced. In the case at bar the penalty or forfeiture is one prescribed by a foreign statute. We urged the rule against forfeitures as an additional reason why our court would not enforce this foreign statute. The latest expression of our court upon this subject is in Sav. & Loan Soc. *v.* McKoon, 52 Pac. Rep. 306, wherein this court said, "Penalties are never favored by courts of law or equity, and statutes imposing penalties or creating forfeitures must be strictly construed. Every intendment or presumption is against the person seeking to enforce the penalty or forfeiture provided by such a statute."

II.

In appellant's Reply Brief (page 7) the case of Huntington *v.* Attrill, 145 U. S. 657, is cited, wherein the Supreme Court of the United States held that a statute of a State will not be construed to be a penal law in the international sense so that it cannot be enforced in the courts of another State, unless its purpose is to punish an
182 offense against the public justice of the State, and not to afford a private remedy to a person injured by the wrongful act. Under this decision a proceeding must be one to punish crime and in the name of the people in order to come within the rule as to penal statutes. Our answer to this citation is that this ruling of the Federal Supreme Court is binding upon State courts only when the question at issue is one which may be re-examined by the Supreme Court of the United States on writ of error (Belcher *v.* Chambers, 53 Cala. 643), that the case at bar presents no such question, and that the rule laid down in Huntington *v.* Attrill is not the rule in any State of the Union.

In California our supreme court, in a decision subsequent to Huntington *v.* Attrill (1892) recognizes the rule that the courts of one State will not enforce the penal statute of another State, even though the object of the statute is only to afford a private remedy to a person injured by the wrongful act.

Ferguson *v.* Sherman, 116 Cal. 169.

To the same effect are the decisions in the following States:
Iowa—Arnold *v.* Potter, 22 Iowa, 194;
Kansas—Dale *v.* Atchison, 47 Pac. Rep. 523;
183 Maine—Phillips *v.* Madrid, 83 Me. 205;
Maryland—Attrill *v.* Huntington, 70 Md. 191;
Massachusetts—Halsey *v.* McLean, 94 Mass. 438;
Missouri—Kimball *v.* Davis, 52 Mo. App. 194;
New Jersey—Derrickson *v.* Smith, 27 N. J. L. 166;
New York—Langdon *v.* N. Y. L. S. & W. R. Co., 11 N. Y. Sup. 514;
Rhode Island—O'Reilly *v.* N. Y. etc. R. R., 14 Am. St. Rep. 353;
Tennessee—Woods *v.* Wicks, 7 Lea. 47;
Vermont—Adams *v.* Railroad, 30 Atl. Rep. 687;
Cook on Stock and Stockholders, § 223, p. 293.

III.

Authorities are cited by appellant in its Reply Brief (page 14) to the effect that Mrs. McGrew's "property rights composed part of the subject-matter of the action" for divorce. This we strenuously deny. The only subject-matter of that action was the status of the parties thereto, and the record of that action, as introduced in evidence herein, is conclusive and exclusive proof of this.

IV.

In respondent's points and authorities (page 19) we contended that—

184 "The utmost effect that a divorce in one jurisdiction can have upon property in another is that a valid divorce may be held to terminate certain property rights that are dependent alone upon the continued existence of the marriage state, and this, independent of the situs of the property. Dower is one instance of such property rights. It is a property right arising from marriage and dependent upon the continuance of marriage during the life of the husband. Its assertion depends upon proving such marriage and continuance."

Appellant in its Reply Brief (pages 14 *et seq.*) cites authorities to the effect that dower is in this regard like all other marital property rights, and that a foreign divorce that would affect dower would equally affect all other property of either husband or wife. Wait *v.* Wait, 4 N. Y. 95, 100, is especially cited as in opposition to our views. If counsel had more carefully read Barrett *v.* Failing, Ill. U. S. 23 (Reply Brief page 16), he would have found that dower, unless preserved by the *lex rei sitæ*, is a marital property right arising solely by virtue of the marital relation, and *ex necessitate* terminating with the termination of this marital relation unless preserved by statute. The Federal court in this decision expressly distinguished Wait *v.* Wait as having been decided under a New York statute.

185 Barber *v.* Root, 10 Mass. 260 (Reply Brief p. 17), is a case in which the husband, after a divorce and when he was no longer a husband, endeavored to enforce a property right that de-

pended upon the continuance of the marital status. The quotation from Ross *v.* Ross, 129 Mass. 248 (Reply Brief page 17) is to the same effect. Both of these citations are in accord with the above quotation from respondent's points and authorities.

V.

Appellant (Reply Brief page 18) cites Cheever *v.* Wilson, 9 Wall. 108, as to the binding effects of a foreign divorce upon property situated beyond the jurisdiction of the forum of the divorce. In this case it appears that a divorce was rendered in Indiana, that both parties appeared therein, and that in the decree it was adjudged that the husband should receive one-third of the income of certain of the wife's separate property situate in the District of Columbia, and it was decreed that the wife should execute to him a sufficient power to collect said income. This power she executed. This was a personal judgment against the wife, and, of course, bound her personally wherever she might be. But this case is not applicable to the case at bar, as there is no personal judgment as to property, as there was in Cheever *v.* Wilson.

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Polson *v.* Stewart, 167 Mass. 211 (Reply Brief pages 18, 19), is not in point. This case involved simply the enforcement in one jurisdiction of a personal contract executed in another jurisdiction. None of these cases or of the others cited in appellant's reply brief go to the extent of holding more than that the courts of one jurisdiction may enforce a personal covenant entered into in another jurisdiction or a personal judgment rendered in another forum, the later having acquired jurisdiction over the person against whom judgment was rendered. No case is cited that holds that a foreign statute is necessarily so enforced, or that Mr. McGrew could have compelled in the courts of this country a transfer of this policy simply upon a production of the decree of divorce. And yet in the cases cited in appellant's reply brief the judgment-roll in the foreign judgment sought to be enforced was all that was competent or material in the case.

The Hawaiian court could not in any action subsequent to the divorce or at any time have rendered any judgment against Mrs. McGrew binding upon her in this jurisdiction to compel a transfer by her of this policy, unless they had acquired jurisdiction over her there in that particular action.

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VI.

We cannot see the application of New England Mutual Life Ins. Co. *v.* Woodworth, 111 U. S. 138 (Reply Brief page 26). We have never questioned the jurisdiction of the Hawaiian court to render any judgment against appellant, if any such was rendered. We simply maintain that such a judgment is *res inter alios acta* as to Mrs. McGrew, and that the offer to prove it as showing a discharge of all obligations under the policy as against every one could not have this effect as to those not parties to that action. Furthermore, there is no proof that the appellant carried on business in Hawaii at the death of the insured or had any agent there on whom process

could be served. Therefore, not only is the last citation not applicable, but the argument on page 27 of this reply brief as to the effect of the treaty is for the same reason not in point.

VII.

The citation on pages 27 and 28 of the reply brief as to the laws of other States is too general to notice. Suffice it to say that
188 the law of California is opposed in letter and principle to the Hawaiian statute sought to be enforced.

VIII.

Appellant's contention is that respondent's title to this policy was divested by the decree of divorce, that this divestiture was an essential incident of the divorce, though not mentioned in the judgment or decree, and that, therefore, as respondent submitted herself to the jurisdiction of the Hawaiian court in the action for divorce, the courts of this country will enforce that decree in every particular and incident.

Respondent's contention is that respondent's title to this policy was not divested by the decree of divorce, that it was only by the statute that any divestiture was attempted, that the courts of this country will not enforce this statute, and that as the right to this policy was not acquired as an essential incident of the marital relation, the divestiture thereof was not necessarily an incident of the divorce, but simply a statutory penalty that was apart from but conditioned upon the divorce. If the title to this policy was transferred to Dr. McGrew, it was transferred solely under the Hawaiian statute, and this we have shown was not possible. A transfer
189 of title by operation of law can only be effected within the limits of the territory where the law prevails; and, as the laws of a State have no extraterritorial force, it follows that the title to property located in one State cannot be passed by force of the laws of another. In such cases the law operates, if at all, on the property, and if the property is without the territorial limits of the State whose legislature enacted the law, it is plain that the law can have no effect upon it except by virtue of comity, and no State is bound to give effect to the law of a foreign State to the prejudice of the rights of its citizens.

Receiver &c. *v.* First Nat. Bank, 34 N. J. L., 454.

Respectfully submitted,

PLATT & BAYNE,
Attorneys for Respondent.

189½ Service of the within reply brief accepted this 28th day of April A. D. 1898.

CHICKERING, THOMAS & GREGORY,
Attorney- for Appellant.

W. E. B.

190 Filed Feb. 28, 1901. Geo. W. Root, Clerk, by R. E. Homlein, Deputy. In Bank.

ALPHONSINE McGREW, Plaintiff and Respondent,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF New York, Defendant and Appellant.
S. F., No. 1230.

Action on a life-insurance policy. Judgment was for plaintiff in the court below and from the judgment defendant appealed.

The respondent is a resident of California where this action was commenced, and the appellant is a resident of the State of New York.

The defense is rather a remarkable one; it rests upon a decree of divorce rendered by a court of the Republic of Hawaii, in an action brought there against the present respondent by the guardian of her husband—a decree which could not have been obtained here; and upon an Hawaiian statute which has no force here except by comity.

The material facts in the case are these: On September 14, 1892, the respondent was the wife of one Henri G. McGrew and she and her husband were then residing and domiciled in Honolulu, Hawaiian islands. On that day the policy of insurance sued on was executed, by which defendant promised to pay five thousand dollars to the respondant herein, Alphonsine McGrew, upon
191 the death of the husband, Henri, provided she should be living at the time of such death. Henri died on the 22nd day of October, 1894, leaving the respondent, his wife, surviving him.

In 1893 Henri and respondent made a trip to California for the benefit of the health of the former; and in the latter part of December, 1893 they returned to Honolulu, he being then in a very feeble mental condition from softening of the brain. When they landed at Honolulu they were met by one Carter who assumed control over them and ordered them not to go to the home in which they had been living, but to go to an hotel. It appears that soon afterwards Carter was the legally appointed guardian of the person and estate of Henri, who had been then judicially declared to be *non compos mentis;* but it does not appear when, he became such guardian. A few days after respondent and her husband went to the hotel Henri was removed by Carter from the hotel to a hospital. Respondent wanted to go back to the home where they had formerly lived, but Carpenter, who had the key and control of the house, would not let her, and he sold all the furniture in it except a piano which plaintiff claimed as her own. Carter would not furnish her a home or any money, and Henri was an imbecile incapable of understanding the situation.

On February 8, 1894, Carter as guardian of Henri brought an action on behalf of the latter to obtain a divorce from respondent, alleging adultery as the ground of the divorce. Service of process was served on respondent in Honolulu, and she appeared in the ac-

tion by an attorney and filed a demurrer, and afterwards an answer denying the charge.

192 On April 5, 1894, respondent left the Hawaiian islands with the intention of not returning there again, but intending to come to California and make her home there. She obtained the funds to pay the expenses of the journey by the sale of her piano. She said that she came to California to make a home here, and also through fear that "they" would take her infant child away from her. She arrived here in the same month—April, 1894—and has since then constantly resided in California intending it as her place of residence.

On August 25, 1894, the Hawaiian court entered a decree of divorce in the said action brought by Carpenter dissolving the bonds of matrimony between this respondent and the said Henri, (and it is not improper to say that the evidence in the case was conflicting). There was nothing in the pleadings in said case about property, and the decree was simply one of divorce without any disposition of any other matter whatever. But there is, and at that time was, a statute of Hawaii which declared that "when a divorce is decreed for the adultery or other offense amounting thereto of the wife, the husband shall hold her personal estate forever."

Respondent contends that the judgment in the divorce suit should be held invalid because, in the absence of an express statute on the subject, an action for a divorce cannot be maintained by a guardian, and there is no such statute in Hawaii—the only one relied on being the general provision that the guardian of an insane person "shall appear for and represent his ward in all legal suits and pro-

193 ceedings, unless where another person is appointed for that purpose;" but admitting these legal propositions to be correct, the courts of Hawaii have held otherwise, and their construction of the statutes of their own country cannot be here assailed. (McGrew *v.* McGrew, 9 Hawaiian Reps. 475.) Full effect must therefore be given to the judgment in the divorce suit.

It is also contended by respondent that the judgment in the divorce suit was never absolute and final, because certain exceptions taken by the defendant's attorney therein have never been disposed of, and it is provided by the Hawaiian statutes that "no order or decree for a divorce shall be made absolute until such exceptions shall have been disposed of." The transcript contains many things about the law of Hawaii touching the taking of exceptions in a trial court and having them certified up to the appellate court, which are somewhat difficult to understand; but as the supreme court of that country seems to have held that the judgment in McGrew *v.* McGrew had become absolute (10 Hawaiian Reps. 117), and as there is no express finding on the subject in the case at bar, we are compelled to hold that the said judgment was final and conclusive as to the matter therein adjudicated.

Under our views of the case it is not necessary to determine the points made by respondent, that the Hawaiian statute has no force here on the ground of comity, because it is penal, works a forfeiture, and is contrary to the public policy of this State, &c.

As the plaintiff herein was served in Hawaii with process in the divorce suit and appeared therein by attorney, the court
194 had jurisdiction and the judgment therein rendered concludes here as to the one thing adjudicated therein. But the judgment is merely a decree of divorce; it does not deal with any property rights; and if, as claimed by appellant, all the personal property of respondent, including the policy sued on, passed to her husband, that result must have flowed from the said Hawaiian statute providing for the forfeiture of the wife's property, and not from anything decreed in the judgment. It was not a case where the adjudication by final judgment of property rights asserted in the pleadings relates back to the commencement of the action; for in that case there were no property rights averred, or considered, or adjudicated. The respondent's right to her property was not affected by the mere pendency of the suit for divorce; and the statute had no applicability until the entry of the judgment. The question, therefore is, what was the right of respondent to the property involved at the time when the said statute could be invoked? And it is clear that if at that time she was domiciled in California the Hawaiian statute had no operation upon her or her personal property here; for the law which governs personal property is the law of the domicile. (See Whitney *v.* Dodge, 105 Cal., 192, and authorities there cited.)

In our opinion the respondent at the time when the Hawaiian statute took effect was domiciled in California. This is clearly so unless we must ignore her actual residence on account of the maxim (or "fiction" as it is sometimes called) that the domicile of the husband is the domicile of the wife. We think that the reason of
195 the rule and of course the rule itself, ceases when the husband discards his wife by instituting proceedings for the dissolution of the bonds of matrimony. The theoretical unity of husband and wife dissolves in the presence of a legal proceeding, the direct and only purpose of which is to destroy that unity. This is admitted to be so where the wife brings the suit for divorce; but the reason of the rule applies to her whether she be plaintiff or defendant; her interests and rights as defendant are frequently more serious than any she could have as plaintiff. It is not the law that a husband who is a plaintiff in a divorce suit can—as in the case at bar—actually put his wife out of his home and at the same time successfully claim that by operation of law she is still in it. We think that the correct principle is stated in the decisions hereinafter noticed. In some of them it was held that the divorce itself was invalid outside of the State in which it was granted, because founded upon the theory that the domicile of the husband was the domicile of the wife, contrary to the actual fact; but the principle applies much more strongly to the case at bar where the question is not as to the validity of the divorce, but as to the operation of a foreign statute upon her and her personal property at a time when she and the property were in this State.

In Irby *v.* Wilson, 1 Dev. & B. Eq. (N. C.) 568, the parties had married in South Carolina where they were then domiciled, had

afterwards removed to and established a residence in Tennessee and then, after a separation, the wife had gone to North Carolina
196 and permanently resided in the latter State; and afterwards the husband had obtained a decree of divorce in Tennessee.

The opinion of the court contains interesting discussions of the doctrine of the extraterritorial force of laws and judgments; but the decision turned on the single point, that the domicile of the wife at the time of the divorce was in North Carolina and not in Tennessee where the domicile of the husband was. The court, among other things, say:

"The aphorism that the husband and wife are but one person has been alluded to as founding the argument that his domicile is necessarily hers, * * * but it is a mere fiction which is never allowed even in the common law to obscure much less defeat justice. They are two persons to make a marriage contract. They must also, necessarily, be two persons to litigate between themselves upon any subject, and above all upon the obligation, continuance, or dissolution of that contract. They are not therefore so identified that they cannot have opposing interests, that they cannot have separate existences and separate residences and homes. If the argument of the counsel were well founded it would prove that the husband might sue his wife for a divorce, enter her appearance, and in her name confess his own allegation."

In Mellen *v.* Mellen, 10 Abbot's New Cas. 329, the court declared the law—we quote for brevity from the syllabus—as follows:

"Although, *prima facie*, the domicile of the wife is the same as that of her husband, the law recognizes an exception to the rule when the husband begins an action to dissolve the marriage contract. In such case, the theoretical identity of person and interest ceases to exist, the legal fiction of one domicile no longer operates, and the jurisdiction of the court to entertain the action depends upon the actual existing facts."

In Colvin *v.* Reed, 55 Pa. St. Reps. 375, the question involved was that of the domicile of parties to a divorce suit; and the court said:

197 "But the unity of person created by the marriage is a legal fiction, to be followed for all useful and just purposes, and not to be used to destroy the rights of either, contrary to the principles of natural justice, in proceedings which from their nature make them opposite parties. It required their mutual consent to establish the relation from which the unity arises; and the same law of right demands them to be viewed in their separate natural condition when either proceeds against the other to destroy this relation. It is the necessary effect of their being opposite parties in the same proceeding."

(See also Derby *v.* Derby, 14 Ill. Ap. 647.)
(Hews *v.* Hews, 16 N. Y. Sup. 119.)

The principle declared in the above cases is recognized and restated in section 129 of the Civil Code of this State as follows:

"In actions for divorce the presumption of law, that the domicile

of the husband is the domicile of the wife, does not apply. After separation, each may have a separate domicile, depending for proof upon actual residence, and not upon legal presumptions."

There is no reason for limiting this broad provision to cases where the wife is plaintiff.

In the case of Wickes' Estate, 16 Pac. Rep. 865, cited by appellant, there was no question as to the law of domicile as between husband and wife when they are hostile parties to a suit for divorce. There had been no divorce nor action for divorce in that case; and no question touching any phase of the subject of divorce was before the court. There a married woman had been living at the time of her death in a county different from the one in which her husband was living and in which she formerly lived with him; and it was merely held that under those circumstances the jurisdiction of the administration of her estate was in the county where her husband resided.

Our conclusion is that at the date of the decree of divorce
198 the respondent was domiciled in California, and had been since she came here in April, 1894; and that therefore the Hawaiian statute under which the forfeiture of her personal property is claimed had no effect upon her or her property in California.

It is not necessary therefore to consider the point made by respondent, that even if her domicile continued to be that of her husband until the date of the decree, yet upon the entry of the decree her actual residence instantly became her legal residence, and that if the decree, the legal change of residence, and the taking effect of the statute were simultaneous, the court under the rule that a forfeiture will always be defeated if possible, will give precedence to the change of domicile.

The court did not err in excluding evidence of the fact that appellant had satisfied a judgment recovered against it by the administrator of Henri G. McGrew on the policy here sued on, in an action to which the respondent here was not a party. The fact that appellant paid the policy to the wrong party would be no defense to an action brought by the right party.

Under the views which we have taken of the case, the other exceptions argued by appellant are of no importance.

The judgment appealed from is affirmed.

McFARLAND, *J.*

We concur:
GARROUTTE, *J.*
VAN DYKE, *J.*
HENSHAW, *J.*
HARRISON, *J.*

[Endorsed:] Decision in Cal. supreme court.
198½ [Endorsed:] S. F. No. 1230. In the supreme court of the State of California. Alphonsine McGrew respondent *vs.* Mutual Life Insurance Co. of New York. appellant. Opinion of the supreme court of the State of California. Chickering & Gregory attorneys-at-law 222 Sansome street San Francisco, Cal.

199 S. F., No. 1230.

In the Supreme Court of the State of California.

ALPHONSINE MCGREW, Respondent,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Appellant.

Petition for Rehearing.

Chickering & Gregory, attorneys for appellant.

Filed this 20 day of March, A. D. 1901.
GEORGE W. ROOT, *Clerk*,
By GEO. H. RYAN,
Deputy Clerk.

W. E. B.

Affirmed. McFarland, J.
Bank briefs.
For opinion see No. 1158, p. 315, Cal. Decisions.
Due Mar. 30, 1901.

199½ In the Supreme Court of the State of California.

ALPHONSINE MCGREW, Respondent,
vs.
MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Appellant.

Petition for Rehearing.

The appellant respectfully requests a rehearing of the above-entitled cause.

The reply brief of appellant was filed in April, 1898, and therefore nearly three years elapsed from that time to the rendition of the opinion. No oral argument has been had, and the novel and interesting questions involved have been decided upon the briefs which necessarily omitted late authorities pertinent to the question.

The judgment in this case is one of peculiar and unusual hardship upon the defendant company.

200 Upon the death of the insured, in October, 1894, the company found itself confronted with two hostile claimants, one in Hawaii, the other in California. It desired to pay the loss to the party rightly entitled, and made no contest on the merits. The administrator of the estate of the insured first commenced his action in Honolulu, and the company raised the point that Mrs. McGrew was a necessary party thereto, thus hoping to bring the two claimants within the one jurisdiction. She was held not to be a necessary party by the supreme court of Hawaii, in Carter *v.* Mutual Life, 10 Hawaiian Reps. p. 19.

Nor was interpleader possible because Alphonsine McGrew was without the jurisdiction of the Hawaiian court, and by publication

of summons no jurisdiction could be obtained, since there was no *res* involved. Jurisdiction cannot be obtained by publication of summons when the only property involved is money which is deposited in court.

Cross *v.* Armstrong, 44 Ohio St. 623.

If this state of the case the only recourse left to the defendant company was to defend the action in Honolulu and trust that the same conclusions would be reached by both the Hawaiian and Californian courts. This was done, and in the briefs filed there all the points which are considered by this court in its opinion were discussed at great length. Especially was the proposition dwelt
201 upon that Mrs. McGrew had become domiciled in another jurisdiction pending the divorce case, and that by reason of this change of domicile the personal property of Mrs. McGrew had passed from without the operation of the Hawaiian statute. The court held this plea to be notwell taken, saying, 10 Hawaiian Reps. 570:

"But however that may be, both parties were undoubtedly domiciled here when the divorce proceedings were commenced, and when the court acquired jurisdiction over them, and that was sufficient so far as the question of domicile was concerned. The court having acquired jurisdiction under these circumstances, the incidents of the divorce would follow according to the law of the place of divorce."

And that opinion also stated, p. 568:

"The company not having brought the widow into court by interpleader is in the unfortunate position of being subjected to two suits, one by the administrator here, the other by the widow in California. It must now rely upon the assumption that the two courts will take the same view of the law. There can be no doubt that the same law should govern, whether the action is brought in Hawaii, California or New York. In our opinion that law is the law of the place of domicile and divorce. We can only assume that the California court will take the same view."

This court has not taken the same view, and, by reason of these diametrically opposite opinions upon the same question, the defendant company is obliged to pay the same policy twice. Such
202 a result has not been brought about by any neglect or failure on the part of the defendant to avail itself of every defense known to the law.

In the light of what is said in the opinion by this court and of subsequent developments, it cannot be seen what possible argument or objection could have been raised to the proceedings in Hawaii which was not raised.

We believe the case to be without a parallel, in the sense that, while frequently double payments of the same claim have been enforced, nevertheless it has been through some fault or negligence on the part of the debtor. But here the result is brought about through the weakness of the judicial system the protection of which has been invoked.

We trust that only after the fullest argument will this court by

its deliberate judgment refuse to follow the decision of the Hawaiian court which had jurisdiction both over the persons and the property involved, and which would seem to be the proper tribunal to decide the question.

We desire the opportunity of arguing this cause upon the following propositions:

First. The judgment in the case of Carter *v.* Mutual Life is conclusive in this case as to the effect of the divorce proceedings upon this policy of insurance.

At the time the divorce proceedings were commenced both Mr. and Mrs. McGrew were domiciled in Hawaii. The application for
203 the policy was made there, and there the policy was delivered, through the agent of the company. Thus all three parties to the transaction, viz: the insured, the beneficiary and the insurance company were domiciled there. Furthermore, the policy recited that it did not go into effect until the first premium was paid. That payment was made in Honolulu and there accepted by the company. (Fol. 7.) It was therefore unequivocally an Hawaiian contract and governed by the laws of that republic. The *lex domicilii* and the *lex loci contractus* concur. That under such circumstances the policy is to be governed by the laws of Hawaii, is directly decided by the very recent case in the Supreme Court of the United States, of

Mutual Life Ins. Co. *v.* Cohen, 21 Sup. Ct. Rep. 105, where a policy of precisely similar form to the one here involved was considered, the court saying:—

"The insurance policy contained a stipulation that it should not be binding until the first premium had been paid and the policy delivered. The premium was paid and the policy delivered in the State of Montana. Under those circumstances under the general rule, the contract was a Montana contract and governed by the laws of that State."

By the decision of the Hawaiian court in this case of Carter *v.* Mutual Life, it was held that, by the commencement of the divorce proceedings the personal property of Mrs. McGrew was neces-
204 sarily involved, because it was a necessary incident of the divorce proceedings.

They decided also, and such decision was necessarily involved in their conclusion, that this life-insurance policy passed to the plaintiff in the divorce proceedings notwithstanding the fact that the defendant had changed her domicile *pendente lite*.

This construction by the Hawaiian court of the effect of their own statute upon a case in their own court is conclusive upon this court.

The settlement of property rights between the parties upon the dissolution of the marriage status is, as said in Gaston *v.* Gaston, 114 Cal. 542, ordinarily an incident of the judgment of divorce.

The Hawaiian court has decided that this particular statute makes the alienation of the wife's personal estate a necessary incident of a divorce upon this special ground.

This judicial definition of the effect of the local statute is conclusive. As said by Story on Conflict of Law, sec. 230 (*b*)

"Incidents of a foreign divorce are also fairly to be deduced from the law of the place where it is decreed. If valid there the divorce will have, and it ought to have, all the effect in every other country upon personal property locally situated there which are properly attributable to it in the forum where it is decreed."

There can be but one right construction of this statute and
205 its effect upon the divorce proceedings. That construction was the same when Carter *v.* Mutual Life was decided as it is now. It is our claim that the construction by the Hawaiian court should be followed by this court, because:—

"A decision of the highest judicial tribunal of a foreign state construing one of its statutes, is to be received elsewhere as an authoritative exposition. Nor is its weight or authority affected by the fact that it was made after the occurrence of the transaction in question, or after the departure from the State of the person affected by it."

Sutherland on statutory construction, sec. 191.

"The principle is that by the *comitas gentium* the courts of the several States must be permitted to construe their own statutes, and it is founded in justice and reason. The courts of each State must be presumed best to understand all the circumstances which influence the judicial construction of the statute."

Bloodgood *v.* Grasey, 31 Ala. 571.

At an early period in the history of the jurisprudence of this country it was decided by Chief Justice Marshall, in Elmendorf *v.* Taylor, 10 Wheaton, 152, that

"We receive the construction given by the courts of the nation as the true sense of the law and feel ourselves no more at liberty to depart from that construction than to depart from the words of the statutes."

And this decision has been uniformly followed by both the Federal and State courts of last resort.

206 To the Hawaiian tribunal therefore must reference be had to ascertain what is a necessary "incident" of a divorce suit brought under this special statute. This definition is conclusive upon this court just as the decision of a California court would conclude an Hawaiian tribunal in the application of the civil code to the property rights of parties divorced here.

But in order to uphold the decision heretofore rendered in this case, it is necessary for this court to decide that the Hawaiian court made a mistake in construing the Hawaiian statute. The obstacle lies at the threshold of plaintiff's case. But the fact that an action was brought by the administrator against the defendant company in Hawaii, and that by that action the company was compelled to pay this loss, is not even referred to in the opinion of this court, except inferentially. Nor is the fact mentioned, that the Hawaiian supreme court has reached an opposite conclusion as to the effect of this local statute.

We respectfully submit that even if the decision of the Hawaiian

court were not binding upon this court, still it at least would merit the distinction of being noticed and distinguished. Indeed, from the opinion by this court, it would appear that the defendant company were in a position of trying to evade this loss, and that it was not through legal compulsion it paid in Hawaii.

207 We again submit that this is hardly a fair statement of the facts or a recognition of the real question at issue.

We therefore respectfully suggest that this Hawaiian case, involving as it does the precise question here raised, should be referred to, and if erroneous, that the reasons distinguishing it should be given. Further, if this court does not wish to adopt the rule that the construction of a foreign court upon its local statute is conclusive, that such decision should be clearly stated.

Second. The Hawaiian judgment in Carter *v.* Mutual Life is conclusive upon another ground.

The theory upon which the opinion proceeds is, that the law of the owner's domicile controls in regard to his personal property. The respondent's whole case must rest upon this proposition.

Whitney *v.* Dodge, 105 Cal. 192,

is relied upon by the court as a precedent. That personal property is, as a general rule, governed by the law of its owner's domicile is undoubted. But this is a rule which has many exceptions. The Civil Code, sec. 946 says:

"If there is no law to the contrary in the place where personal property is situated, it is deemed to follow the person of the owner and is governed by the law of his domicile."

And in the opinion cited it is said by Mr. Justice McFarland:

"Any State would have the rightful power to provide that the rule above stated should not prevail within its jurisdiction."

208 And in

Farmers' and Mechanics' Nat. Bank *v.* Loftus, 7 L. R. A. 313,

it is said:

"In one sense personal property has locality, that is to say, if tangible it has a place in which it is situated, and if invisible (consisting of debts) it may be said to be in the place where the debtor resides; and of these circumstances the most liberal nations have taken advantage by making such property subject to regulations which suit their own convenience. Every country has the right of regulating the transfer of all personal property within its territory, but when no positive regulation exists, the owner transfers it at his pleasure."

Dicey on Domicil, p. 265, says:

"Where there is a conflict between the law of the country in which the personal property is situated and the law of the owner's domicile, the *lex situs* will in general prevail."

And it must be said that the tendency of modern authorities under the influence of the civil law is toward the recognition of the

law of the *situs*, to such an extent that what was an exception is tending to become the rule.

Storey Conflict of Law, sec. 383;
Wharton Conflict of Law, secs. 346, 353.

The property here involved was a chose in action, and the question is, What was its *situs?*

As before stated, it cannot be doubted that the *lex loci con-*
209 *tractus* was of Hawaii, and being an intangible thing, the *lex situs* was of the country where the debtor resides. In the present case this was undoubtedly Hawaii, where the premium was paid to the agent and the policy delivered. This flows as a necessary conclusion from the decision of the Supreme Court of the United States in the N. E. Mutual Life Ins. Co. *v.* Woodruff, 111 U. S. 138. In that case it was held, that letters of administration could be taken out upon the estate of the insured in Illinois, although she had never resided in that State, and the only property which she had there was a policy of insurance issued by the defendant company which had a local agent there upon whom process could be served. It was held that the insurance company although incorporated and having its principal place of business in another State must be regarded as having a domicile in the State of Illinois "in the sense of the rule that the debt of the policy is assets at its domicile."

Not only was the debtor domiciled in Hawaii, as far as this claim was concerned, but the evidence of the indebtedness, viz., the policy, was always in Hawaii, and was returned to the company cancelled when the loss was there paid to the administrator of McGrew's estate.

If, then, there was anything in the laws of Hawaii which stated that the *lex domicilii* should not govern in cases of this character, it must follow that the fiction of plaintiff's rights in this policy following her to California does not apply.

210 We claim that there did exist such a provision in the laws of Hawaii, as must appear at once from the reading of the treaty rights then existing between the United States and that country, where it was provided:

"If the question should arise among several claimants as to which of them said goods belonged, the same should be decided finally by the laws and judges of the land wherein the said goods are."

This treaty is as much a part of the law of the State of California as its own local law and constitution.

Hauenstein *v.* Lynham, 100 U. S. 483.

Therefore the decision of the Hawaiian court in Carter *v.* Mutual Life is controlling, because it is the decree of a court where the "goods were."

Third. The divorce suit was concerned with personal property rights from its commencement.

It is stated in the opinion of the learned justice that the plaintiff here is concluded by the Hawaiian judgment in the divorce case as

to the one thing adjudicated therein only; that there were no property rights averred or considered or adjudicated therein, and that therefore Mrs. McGrew's rights to her personal property were not affected by the mere pendency of the suit.

It is upon this assumption also that the whole case of respondent must rest It is this part of the opinion to which we desire
211 to pay especial attention, for we insist that the personal property rights of Mrs. McGrew were involved from the commencement of the divorce action; that since they were so involved her departure from Hawaii could not in any way subtract from that jurisdiction.

The pertinent inquiry then is, What was the subject-matter in the suit of McGrew *v.* McGrew? We answer, first, dissolution of the marriage tie; second, custody of the child; third, alienation of the wife's personal estate.

It is undoubted that all divorce jurisdiction rests upon statute. It is not a common-law proceeding. The court in dealing with the dissolution of the marriage tie and the rights incident thereto, has such jurisdiction as the legislature confers upon it and none other. As was said in Hopkins *v.* Hopkins, 39 Wis. 171,

"It is a general principle of the law of divorce in this country that the courts, either of law or of equity, possess no powers except such as are conferred by statute; and therefore authority for the action of the court in that class of cases must be found in the statute and cannot be looked for elsewhere."

This power of the legislature is unlimited, as is shown by the fact that it may without notice and without any judicial proceeding dissolve the marriage tie.

Maynard *v.* Hill, 125 U. S. 190.

Therefore, in any consideration of the effect of this Hawaiian
212 judgment, the first step is to read the statute into the pleadings, and then see the scope of the proceeding. From such reading the conclusion seems inevitable that the wife's personal estate was necessarily involved in every suit for divorce brought in the Hawaiian court for the special offense charged. The statute gave to the wronged husband, upon divorce, the same rights which the common law gave him upon marriage. The terms of the statute are a part of every libel for divorce filed, and in such a case any allegation of property rights in the pleadings, or prayer concerning them, is unnecessary and, indeed, improper.

Barrett *v.* Failing, 6 Saw. 473;
(Affirmed in 111 U. S. 523);
Bamford *v.* Bamford, 4 Or. 30;
Smith *v.* Smith, 13 Mass. 231.

This proceeding, therefore, was something more than a suit for divorce and it had as much effect upon the personal estate of Mrs. McGrew from its commencement as it would had there been allegations in the libel touching her personal estate, and a prayer for its alienation. When respondent was served with a libel for divorce,

the law forced upon her the knowledge that there was inserted therein a prayer that, upon rendition of the decree, her personal estate should pass to the plaintiff. Can it be said, then, that this personal estate was not involved in this case from its commencement? By what possible change of her domicile after
213 the commencement of the proceedings could she voluntarily evade the force of the judgment which might thereafter be rendered?

We again beg to impress upon the court that we are not concerned with the doctrine of *lis pendens*. We admit that in an ordinary action for divorce in this jurisdiction, where no mention is made of property rights in the pleadings, the prayer being merely for divorce and alimony, a *bona fide* transfer of property by the defendant to an innocent third party *pendente lite* gives to the latter a good title. This is based upon the law of notice. But in the present case the rights of a third party are not involved. The plaintiff here is the same person who was the defendant there, and it is quite impossible to reach the conclusion that Mrs. McGrew after she was served with the libel did not have notice that her personal estate was involved in the litigation.

The general rule that personal property follows the person of its owner cannot apply when that owner removes to another domicile with full notice that her claim of ownership is disputed. This knowledge alone is as concerns her title sufficient to impress a claim upon the property right. It is stated in the opinion of this court that the rule that the domicile of the wife follows that of the husband is sometimes called a "fiction." Therefore the rule that personal property follows the person of its owner is also a fiction. But fictions
of law hold only in respect "to the ends and purposes for
214 which they were invented. When they are urged to an intent and purpose not within the reason and policy of the fiction, the other party may show the truth."

Morris *v.* Pugh, 3 Burr. 1243.

The reason of the rule that personal property follows the person of its owner is to prevent confusion as to the true title. It is primarily for the benefit of third parties, in order that they may know what law correctly defines the title. But this does not apply to the present case because the matter arises *inter sese*.

We claim, therefore, that Mrs. McGrew, with the notice which she had of litigation pending, did not bring to California the unrestricted and free ownership of this policy of insurance, but it was necessarily coupled with a condition which might defeat that ownership altogether.

The decision in this case must hold what is indeed a dangerous principle. It must decide that a defendant in a divorce proceeding may, by acquiring another domicile *pendente lite* deprive the original court of any power to dispose of personal property belonging to the community, unless an attachment or special lien has been impressed upon it. For example, a husband is sued for divorce in California, on the ground of adultery or extreme cruelty. Among

the property rights mentioned in the pleadings is a chose in action which belongs to the community estate.

215 This is our case. In the Hawaiian jurisdiction the law inserted a mention of the wife's personal estate in the pleadings. It is within the power of the court of California to award all of this community interest to the innocent party (Civil Code, sec. 146), and it can by this decree enlarge the wife's estate from a mere expectancy to that of an ownership in fee.

Can it be said that the defendant, as soon as he is served with papers in such a suit, may transfer his domicile to Nevada, thereby preventing the courts of this State from awarding the property in question to the wife? Can he by his change of domicile deprive the court of its jurisdiction previously vested?

The decision in this case must necessarily answer the preceding question in the affirmative, and hold that in such a case the property in question had quite passed beyond the jurisdiction of the California court and any order which it might make concerning it would be a nullity.

If such be the law we doubt not that there will be a general exodus of recreant spouses when summoned into court to answer for their misdeeds. All they will have to do will be to transfer their property into personal estate and take it with them. Having once gotten it beyond the borders of the State, they may take up a new home and enjoy the riches thus transported, free from any fear that the judgment in the Californian court may afterwards be enforced in the new jurisdiction.

216 The case at bar presents features infinitely stronger in favor of our supposition than does this supposititious case; for the Hawaiian statute is mandatory, whereas the Californian statute confers discretionary powers. By the former the *the* alienation of the estate flows from the operation of the law; by the latter from the decree of court.

Now assuming that the Hawaiian statute had expressly said that, upon a rendition of a decree of divorce for the wrong specified, the husband should hold his wife's personal estate forever and the same shall be affected by the divorce proceedings from the commencement. The legislature of Hawaii had full power to make such a law if it saw fit. But we ask what possible force would such a statute have over that which did exist? So far as it affected third parties it might be of greater efficacy in giving them notice, but as to the parties to the action they now receive notice by the service of process and the very fact that the action is commenced.

As previously stated, the foregoing propositions have never been argued before this court. The case is one of first instance.

We submit that they are of too great importance not to be directly passed upon.

Respectfully submitted,

CHICKERING & GREGORY,
Attorneys for Appellant.

217 In the Supreme Court of the State of California.

ALPHONSINE McGREW, Respondent,
vs.
MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Appellant.

Petition for Writ of Error to the Supreme Court of the State of California.

To the Honorable William H. Beatty, chief justice of the supreme court of the State of California:

The petition of the Mutual Life Insurance Company of New York for a writ of error to the supreme court of the State of California respectfully represents:

First. That heretofore, to wit, on or about the — day of ——, 1895, one Alphonsine McGrew commenced an action in the superior court of the city and county of San Francisco, State of California, department three thereof, against your petitioner, to recover from it the sum of five thousand (5,000) dollars with interest thereon from February 9, 1895, and costs of suit.

Second. That the complaint in said action was in the ordinary form of a complaint upon the expressed promise of the defendant company to pay to the said Alphonsine McGrew the said sum
218 of five thousand (5,000) dollars as the amount of an insurance policy theretofore issued by said defendant company upon the life of Henri Goulden McGrew, and payable to said Alphonsine McGrew as beneficiary.

Third. That thereafter, to wit, upon the 14th day of August, 1895, said Alphonsine McGrew filed an amended complaint, which in all material respects was similar to the original complaint in said action, and thereafter, to wit, upon October 15th, 1895, an amendment to said amended complaint was filed.

That thereafter, to wit, upon May 19, 1897, the defendant filed an amended answer to said amended complaint, wherein the defendant denied that it was indebted to plaintiff in any sum, and alleged that prior to the institution of said action by Alphonsine McGrew, an action had been brought by the administrator of the insured, to wit, Henri G. McGrew, in the circuit court of the first judicial circuit of the Republic of Hawaii, which said action was designated as "J. O. Carter, administrator, *vs.* Mutual Life Insurance Company of New York," and was brought to recover the amount due on said policy of insurance, to wit, the sum of five thousand (5,000) dollars. Said answer further alleged that a final judgment had been rendered in said action of Carter *vs.* Mutual Life Insurance Company, in favor of the plaintiff therein, and that said company was compelled to satisfy the said judgment and to pay the amount thereof, to wit, $5,599.59, and it received back the said policy of insurance, duly canceled.

Fourth. That, according to the laws of the State of Cali-
219 fornia and the practice there prevailing, said answer was sufficient to put in issue the right of recovery on the part of said plaintiff.

That thereafter, to wit, on May 13, 1897, said action of Alphonsine McGrew *vs.* Mutual Life Insurance Company of New York was tried by said superior court of the city and county of San Francisco, and in said action it was claimed by the defendant that it was not indebted to said Alphonsine McGrew, because it had already paid the said policy of insurance by reason of the judgment rendered in said Hawaiian court, which said court had jurisdiction over all the parties thereto. It was further claimed by said defendant company that, prior to July, 1894, an action had been commenced by said Henri G. McGrew by his guardian, Charles L. Carter, against said Alphonsine McGrew, for a divorce; that in said action said Alphonsine McGrew was duly served with process in the Republic of Hawaii, where all the parties to said action were then domiciled, and thereafter appeared in said action and defendant the same.

That said action prayed for a divorce from the said Alphonsine McGrew, upon the ground of adultery of said Alphonsine McGrew, and that said circuit court of Hawaii, wherein the said divorce action was pending, was a court of competent jurisdiction and then had jurisdiction over all the parties to said action and said cause of divorce.

That thereafter, to wit, upon the 18th and 20th days of August, 1894, said divorce cause was heard by said circuit court of Hawaii, and both parties appeared therein, and subsequent thereto, to wit, on August 23rd, 1894, a decision was rendered by said circuit
220 court dissolving the bonds of matrimony theretofore existing between said parties, upon the ground of adultery of said Alphonsine McGrew; that said decree of divorce has ever since been, and now is in full force and effect.

That there was, at the time of said divorce action being instituted, and also at the time said decree of divorce was granted, a statutory law of the said Republic of Hawaii, which provided:

"When a divorce is decreed for the adultery, or other offense amounting thereto, of the wife, the husband shall hold her personal estate forever, and he shall hold her real estate so long as they shall live, and if he shall survive her, and there shall be issue to the marriage born alive, he shall hold her real estate for the term of his own life, as a tenant by courtesy; provided that the court may make such reasonable provision for the divorced wife out of any real estate that may have belonged to her as it may deem proper."

Fifth. That said circuit court of Hawaii, in said action of J. O. Carter, administrator, against the Mutual Life Insurance Company of New York, had decided, prior to the trial of this cause, that all the interest of said Alphonsine McGrew in and to said policy of insurance and the money stipulated to be paid thereby had, by said action and decree of divorce, become the property of said Henri G. McGrew, and upon his death passed to the administrator of his estate, to wit, said J. O. Carter, and that said property right

of Alphonsine McGrew was a necessary incident of said divorce action.

That said policy of insurance was delivered by said defendant company, through its agent at Honolulu, to the said insured at Honolulu, and the premiums were paid thereon, and the said policy was, during all the times herein mentioned, in said city of Honolulu.

221 Sixth. It was further claimed that by a treaty concluded between the United States and the Kingdom of Hawaii, in 1849, it was provided:

"That if a question should arise among several claimants as to which of them said goods belonged, the same shall be decided finally by the laws and judges of the land wherein said goods are."

Seventh. That thereafter, to wit, upon the 11th day of October, 1897, the said superior court of the city and county of San Francisco, pursuant to the law and practice of California, made its findings and decision in writing, and found that the plaintiff was entitled to a judgment against your petitioner for the sum of five thousand (5,000) dollars, together with interest thereon from February 9th, 1895, and for her costs of suit; and thereafter, to wit, upon said October 11, 1899, said judgment was recorded in Book 39 of Judgments, page 229, in the office of the clerk of said superior court.

That thereafter, to wit, upon November 2, 1897, in accordance with the law and practice of the State of California, your petitioner gave notice of an appeal from said judgment of said superior court to the supreme court of the State of California; and thereafter, and within due time filed its transcript on said appeal in said supreme court.

Eighth. That the supreme court of the State of California consists of two departments, and said appeal was assigned to department number two for hearing and determination, and that under the rules of said supreme court, appellant shall file with the clerk its points and authorities, and within thirty days thereafter respondent

222 shall file his points and authorities, and within ten days thereafter appellant may file *her* reply, and that all of said points and authorities constitute part of the record on appeal in said supreme court.

Ninth. That said briefs on behalf of appellant and respondent were filed in accordance with said practice of the supreme court of the State of California, and extensions of time so to do duly granted.

That in the briefs filed by said appellant, your petitioner, it was claimed that the judgment of said superior court contravened the treaty rights conferred upon it by said treaty existing between the United States and the Kingdom of Hawaii, in that the said superior court had refused to follow the decisions of the courts of Hawaii, heretofore referred to, wherein it was decided that said insurance policy became the property of Henri G. McGrew upon the decree of divorce being rendered, and that the judgment of said superior court was erroneous in that it did not allow the ownership of the said policy to be decided by the laws and judges of the land wherein the said goods were.

That said appeal was submitted to said department number

two without argument; and thereafter the said cause was by said supreme court ordered to be heard by said supreme court sitting in bank, in accordance with the law and practice of said court; and thereafter, to wit, upon February 28, 1901, said supreme court rendered its decision on said appeal, affirming the judgment of said superior court.

That under the provisions of the constitution of the State
223 of California judgment of the supreme court of the State becomes final upon the expiration of thirty days after such judgment is pronounced.

That your petitioner filed a petition for rehearing in said supreme court, on March 20, 1901, and that said supreme court, on March 29, 1901, denied said petition, and said judgment pronounced by said supreme court is the final judgment of the highest court in the State of California in which a decision in said action can be had, and that in said action was drawn in question the validity of the rights conferred by said treaty existing between the United States and said Kingdom of Hawaii, and the decision of said supreme court of the State of California was against the rights conferred by said treaty.

Tenth. That said supreme court did not directly pass upon the rights conferred by said treaty, but the said court could not have reached its conclusion averse to your petitioner without holding against the validity of the rights conferred upon your petitioner by said treaty, and the adjudication of said question was necessarily involved in the decision on said appeal by said supreme court of the State of California.

Your petitioner presents herewith a copy of the record on appeal to the supreme court of the State of California in said action, and hereby refers to and makes the same a part of this petition.

Wherefore, your petitioner respectfully prays that a writ of error be granted to the supreme court of the State of California, pursuant to the law and practice in that behalf.

CHICKERING, THOMAS & GREGORY,
Attorneys for Petitioner.

224 In the Supreme Court of the State of California.

ALPHONSINE MCGREW, Respondent,
vs.
MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Appellant.

Assignment of Errors.

On this 30th day of March, 1901, came the Mutual Life Insurance Company of New York, a corporation, by Chickering, Thomas & Gregory, its attorneys, and say that in the records and proceedings in the above-entitled action there is manifest error in this, to wit: By the records aforesaid it appears that the judgment given and entered in said suit against said defendant and in favor of said plaintiff should have been given for said defendant and against said plaintiff, for the following reasons:

First. That the ownership of the policy upon which said suit is based had been decided by the courts of last resort of the Republic of Hawaii to be in Henri G. McGrew and not in said plaintiff, and therefore the decision of this court in said cause is repugnant to the provisions of the treaty then and now existing between the United States and the Republic of Hawaii, by which it was provided, among other things, "that if a question should arise among several claimants,
as to which of them said goods belonged, the same should be
225 decided finally by the laws and judges of the land wherein
said goods are," and the decision of this court deprives said petitioner of a right conferred by said treaty.

CHICKERING, THOMAS & GREGORY,
Attorneys for Petitioner.

Said writ is allowed this 6th day of April, A. D. 1901.

W. H. BEATTY,
Chief Justice of the Supreme Court of California.

225½ [Endorsed:] S. F. No. 1230. In the supreme court of the State of California. Alphonsine McGrew respondent *vs.* Mutual Life Insurance Co. of New York, appellant. Petition for writ of error to the supreme court of the State of California, and assignment of error-. Filed Apr. 6, 1901 Geo. W. Root, clerk By A. E. Homlein, deputy. Chickering & Gregory, attorneys-at-law, 222 Sansome street, San Francisco, Cal.

226 *Citation.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to Alphonsine McGrew, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden in the city of Washington, in the District of Columbia, within sixty days from date hereof, pursuant to writ of error filed in the clerk's office of the supreme court of the State of California, wherein Mutual Life Insurance Company of New York, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. W. H. Beatty, chief justice of the supreme court of the State of California, the 6th day of April, 1901.

W. H. BEATTY,
Chief Justice Supreme Court of California.

Receipt of the within citation is hereby admitted this 6th day of April, 1901.

PLATT & BAYNE,
Attorney- for Defendant in Error.

226½ [Endorsed:] Original. S. F. No. 1230. Supreme court of the State of California. Alphonsine McGrew *vs.* Mutual Life Ins. Co., a corporation. Citation. Filed Apr. 9, 1901. Geo. W. Root, clerk. By W. E. Boody, deputy. Chickering & Gregory, attorneys-at-law, 222 Sansome street, San Francisco, Cal.

227 In the Supreme Court of the State of California.

ALPHONSINE MCGREW, Respondent,
vs.
MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a Corporation, Appellant.

Know all men by these presents: that we, Mutual Life Insurance Company of New York, a corporation, as principal, and Warren Gregory and Stanley Forbes as sureties, are held and firmly bound unto Alphonsine McGrew in the full and just sum of one thousand (1,000) dollars, to be paid to the said Alphonsine McGrew, her certain attorney, executors, administrators and assigns, to which payment, well and truly to be made, we bind ourselves, our and each of our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this 6th day of April, in the year of our Lord nineteen hundred and one.

Whereas, lately in the supreme court of the State of California, in the suit pending in said court between said Alphonsine McGrew, plaintiff, and said Mutual Life Insurance Company of New York, defendant, a judgment was rendered against said defendant and in favor of said plaintiff, and said defendant having obtained from the chief justice of said supreme court of the State of California
228 a writ of error to reverse said judgment in the aforesaid suit, and a citation directed to said Alphonsine McGrew, citing and admonishing her to be and appear at a Supreme Court of the United States to be holden at the city of Washington, District of Columbia, within sixty days from date hereof;

Now the condition of the above obligation is such, that if the said Mutual Life Insurance Company of New York, a corporation, as aforesaid, shall prosecute said writ of error to effect, and answer all damages and costs if defendant fail to make *their* plea good, then the above obligation to be void, otherwise to remain in full force and effect.

THE MUTUAL LIFE INSURANCE — OF NEW YORK,
By A. B. FORBES, *Gen'l Agent.*
STANLEY FORBES.
WARREN GREGORY.

[Notary Seal and Acknowledgment.]

STATE OF CALIFORNIA, } ss:
City and County of San Francisco, }

Warren Gregory and Stanley Forbes, the sureties named in the foregoing bond being duly sworn, each for himself, deposes and says: that he is a householder in said State of California and is worth the sum of one thousand (1,000) dollars, exclusive of property exempt from execution, over and above all his just debts and liabilities.

WARREN GREGORY.
STANLEY FORBES.

W. E. B.

Subscribed and sworn to before me this 6th day of April, 1901.

ALFRED A. ENGUIST,
Notary Public, etc.

W. E. B.

229 Form of bond and sufficiency of sureties approved this 6th day of April, 1901.

W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

W. E. B.

230 [Endorsed:] S. F. No. 1230 In the supreme court of the State of California. Alphonsine McGrew respondent *vs.* Mutual Life Insurance Co., of New York, appellant. Bond. Filed April 6th 1901 Geo. W. Root clerk by A. E. Hemlein deputy Chickering & Gregory attorneys-at-law 222 Sansome street San Francisco, Cal.

231 In the Supreme Court of the State of California.

I, Geo. W. Root, clerk of the supreme court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of record*e*rs in S. F. 1230 McGrew *vs.* Mutual Life consis-ing of pages one to two hundred and twenty-nine—and same constitute all paper- on writ of error in above-entitled cause as shown by the records of my office.

Witness my hand and the seal of the court, this 7th day of May, A. D. 1901.

[Seal Supreme Court of California.]

GEO. W. ROOT, *Clerk,*
By W. E. BOODY, *Deputy.*

[Endorsed:] S. F. No. 1230. In the supreme court, State of California. McGrew *vs.* Mutual Life Insurance.

232 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the supreme court of the State of California, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the supreme court of the State

of California, before you or some of you, being the highest court of the said State of California in which a decision could be had in the action between Alphonsine McGrew, plaintiff, and Mutual Life Insurance Company of New York, a corporation, defendant, wherein was drawn in question the validity of a provision of a treaty existing between the United States and the Republic of Hawaii, and the decision of the said supreme court of the State of California being against a right conferred by a provision of said treaty, a manifest error hath happened to the great damage of said Mutual Life Insurance Company of New York, a corporation, as aforesaid, as by their complainant appears, we being willing that error, if any hath been done, shall be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf do command you, if judgment be therein given, that then, under your seal distinctly and openly you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, in the District of Columbia, on
Monday the 3rd day of June next, in the Supreme Court of
233 the United States, to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the sixth day of April, in the year of our Lord nineteen hundred and one.

[Seal U. S. Circuit Court, Northern Dist. Cal.]

SOUTHARD HOFFMAN,
Clerk of the Circuit Court of the United States for the Northern District of California, in the Ninth Circuit,
By W. B. BEAIZLEY, *Deputy Clerk.*

Allowed by—
W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

234 [Endorsed:] S. F. 1230 Original Supreme Court of the State of California Alphonsine McGrew *vs.* Mutual Life Ins. Co., a corporation Writ of error to the supreme court of California. Filed Apr. 6 1901 Geo. W. Root, clerk. By A. E. Homlein, deputy. Chickering & Gregory attorneys-at-law 222 Sansome street San Francisco, Cal.

Endorsed on cover: File No. 18,187. California supreme court. Term No. 336. The Mutual Life Insurance Company of New York, plaintiff in error, *vs.* Alphonsine McGrew. Filed May 25th, 1901.

COPY BOUND CLOSE IN CENTER